

## THE COMMISSION ON FREEDOM OF THE PRESS

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BY ZECHARIAH CHAFEE, JR.

GOVERNMENT  
*and*  
MASS COMMUNICATIONS  
VOLUME I

*A Report from the Commission on Freedom of the Press*



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*To*  
**B. S. C.**  
*For Thirty-five Years*



## STATEMENT BY THE COMMISSION

**S**OME explanation is desirable as to the place which this book on the relations between the government and mass communications occupies in the general inquiry of the Commission on Freedom of the Press.

At the outset of its work, the Commission decided that it ought to give a broad scope to the phrase "freedom of the press." The word "press" should not confine us to newspapers or printed matter generally; the inquiry should include other means of communicating news and opinions such as films and radio broadcasting of news and comment. And "freedom" must mean more than the traditional conception of immunity from governmental control.

A central question for the Commission has been: How can the communications industries realize their possibilities of meeting the needs of the kind of society we have and the kind of society we want? What obstacles—external and internal—hinder mass communications now from doing their best work or are likely to hinder them in the measurable future, and how can these obstacles be lessened? Governmental restriction is only one sort of external obstacle. It has hitherto received by far the most attention, because, during the first centuries of printed books and then newspapers, it was the chief obstacle. The advance of the Industrial Revolution has created new obstacles and influences, such as the pecuniary interests of owners and advertisers, the power of pressure groups, the desire to obtain an enormous circulation, the public's craving for entertainment, and the relative decrease in

## STATEMENT BY THE COMMISSION

the number of persons who can acquire and operate a successful newspaper. The very disturbing problems presented by these nongovernmental influences receive much attention in the Commission's general report, *A Free and Responsible Press*.

Another departure by us from the traditional conception was the recognition that freedom *from* something is not enough. It should also be freedom *for* something. The wide immunity from governmental control which the press claims will be empty if it be a mere negation. Freedom is not safety but opportunity. Freedom ought to be a means to enable the press to serve the proper functions of communication in a free society.

This affirmative attitude toward freedom of the press opens up a very wide range of questions. The act of deciding what mass communications should do for society carries with it the need to envisage the kind of society we desire. Here again the government is only one factor. Take, for example, the question whether there needs to be a stronger consciousness of purpose among Americans. One member of the Commission said: "The fact which we appear to face today is that men do not know what they want in any socially reliable way." And another asked: "Are the people of this country disturbed whether they have lost control over their own destinies?" Fascism takes advantage of this bewilderment by supplying a purpose, though a bad one. If government is not thus to play a dominant part, it is essential to explore other possibilities of a private nature for producing a common purpose, in so far as such a purpose is craved by the people. The press itself is a means to that end. How can the press be used to get the kind of community we want? That is a key question, but it belongs in the general report.

## STATEMENT BY THE COMMISSION

At the same time this affirmative way of looking at the freedom of the press has suggested a friendlier view of the relationship between the government and mass communications. Past writers on this freedom have commonly regarded the government as solely an enemy of the press. Yet when we come to think of both democratic government and freedom of the press as positive means for the attainment of a fuller and more satisfying life for the community and its citizens, it seems absurd to assume a complete hostility between them. Instead, government can perhaps legitimately help to strengthen mass communications and their freedom. Possibilities of that sort will be examined at length in Volume II of this book. Still, the nongovernmental obstacles to the full realization of the opportunities open to mass communications must, on the whole, be removed by forces outside the government. Even if laws and officeholders could get rid of bad newspapers, they could not create good newspapers in their place. In the end, the quality of newspapers and motion pictures and radio must depend on the sense of responsibility of two groups of private citizens—the owners and managers who operate these instrumentalities of communication and the public who consume the output and who have hitherto rarely expressed the desire for something better than what they are now getting.

Thus governmental action is only part of the main problem of the Commission on Freedom of the Press, perhaps a small part. As one wise informant told us: "It is not governmental restraint which either creates or can completely solve the problem of free communication. Not even ten per cent of the problems of a free press arise from governmental action." Nor, on the other hand, can the government furnish the remedies for most of the evils. Yet the stress which the Com-

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mission properly lays on self-regulation, consumer demand, and other nongovernmental factors should not lead citizens to minimize the importance of governmental activity. Aside from new affirmative phases of state action, the impulse to suppress by law is by no means dead. Recent European history shows what can happen, and chapter 1 describes numerous tendencies in this country pointing toward future interference with the press.

Hence the Commission asked Mr. Chafee to undertake this survey of the relations between the government and mass communications.

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## PREFACE

**T**HE comparative space devoted to various topics in these two volumes may appear oddly proportioned, but there are several reasons why some matters are treated at length and others very briefly. First, considerable attention is given to several controversial questions which aroused particular interest at the meetings of the Commission, such as the correction of errors and the administration of the Post Office. Second, since international communications and some domestic matters like motion pictures and the radio form the subject of other special studies published by the Commission, I have tried to avoid duplication.<sup>1</sup> Third, wartime questions have been treated briefly. They are quite different in character from those which arise in peace, and, if another war breaks out, it will be so catastrophic that it is useless to try to write rationally about its effect on communications. Whatever our fears, we hope for a long-continued peace. Such a peace will offer plenty of problems which will demand the utmost wisdom from lawgivers and newspaper owners, etc., if they are to be satisfactorily solved. I prefer to give what aid I can toward their solution rather than to speculate about Armageddon. Finally, I have said little about the legal position of extreme radicalism or fascism and other unpopular opinions. The importance of "the subsidiary press" is undeniable, but it seemed more profitable to investigate problems arising from

<sup>1</sup> *Peoples Speaking to Peoples: A Report on International Mass Communication* by Llewellyn White and Robert D. Leigh; *Freedom of the Movies* by Ruth A. Inglis; and *The American Radio* by Llewellyn White—all published by the University of Chicago Press.



## PREFACE

the material which reaches American citizens of all sorts in daily newspapers, newsreels, radio comment, and so on.

These omissions of questions of war and revolutionary talk are offset by the fact that a full presentation of my views on these subjects is accessible in my book on *Free Speech in the United States*.<sup>2</sup> On these and other topics, a reference to the earlier book is occasionally inserted for the benefit of those who would like to read more than is set down here, and I have quoted a few passages to express certain basic convictions instead of hunting for different phrases. However, there is very little overlapping between the two books because the numerous discussions among members of the Commission have pointed out many new problems and thrown fresh light on some old ones.

This is a book for citizens who are interested in the press. Hence the use of court decisions is limited to cases which are significant landmarks or illustrations of important principles. A book like this can only try to sum up the authorities fairly, without mentioning exceptions and variations in particular states. Its propositions of law are sometimes subject to unmentioned qualifications, which lawyers expect but which cannot be explained accurately to anybody else without boring him. In short, this is not a legal treatise to help lawyers write briefs but a series of sketches of various ways in which the law operates upon newspapers and other agencies of communication.

Although no one but myself is responsible for the specific statements in this book, the credit for whatever anybody likes in it belongs mostly to the whole Commission on the Freedom of the Press, including the Foreign Advisers, the Director, and

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the other members of the Staff. Many of the views expressed are the distillation of earnest and stimulating discussions. Often the very words used are not mine but came from the lips of some associate. They express what I think right so much better than I could that I refuse to let them be lost. Sometimes quotation marks indicate these observations of others, but, if this were done every time they occur, the book would be hard to read. In large measure, my functions as author and as interpreter are inextricably mingled. This book is the outcome of the most interesting and enjoyable co-operative enterprise in which I have ever engaged. What was said counts more than who said it.

Z. CHAFEE, JR.



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# **INTRODUCTION**





## GOVERNMENT AND PRESS TODAY AND TOMORROW

The function of keeping the channels open is not yet so extensively exercised as to have attracted much general attention, not at least apart from the powers of the Federal Communications Commission. The actual participation of the government in the two-way process of discussion is still more novel. Just now it seems likely to be somewhat lessened.

Therefore, if we find problems of governmental relations to the press which perplex or worry us, they do not lie in present actualities but in possible future results from existing tendencies.

### OUTLOOK FOR A CONTINUANCE OF A MINIMUM OF GOVERNMENTAL INTERFERENCE WITH THE PRESS—FAVORABLE AND UNFAVORABLE FACTORS

Which way are recent trends moving—toward the realization of a completely free press or away from it?

#### IS A TOTAL DISAPPEARANCE OF RESTRICTIONS LIKELY?

An extreme position was taken by one of our informants—that there will be a progressive relaxation of restrictions ending in their total disappearance. He thought that increasing freedom of thought would destroy the taboos which give rise to suppression and so eliminate the need for even minimal standards. He said: "There is no telling how far we might progress in the social sciences if they were as free of taboos as the physical sciences have been."

The Commission does not accept this evolutionary conception of the elimination of all forms of corruption. Even if Hamlet was right in saying that "there is nothing either good or bad, but thinking makes it so," we see no prospect that the community will cease thinking that some forms of expression are so bad that they ought to be stopped. Take obscenity, for example. We have to take account of the commercialization of

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widen the channels and keep traffic moving smoothly. Hyde Park is a familiar example of encouraging discussion. On a large scale the best-known instance is the management of radio broadcasting by the Federal Communications Commission.

Third, the government may be itself a party in the two-way process of communication. It may send out news, opinions, and exhortation to the people; or it may organize methods of collecting facts and opinions from the people. We may call the outward flow "information service" and the inward flow "intelligence service." The Office of War Information is one of the most notable American examples of the former.

These three types of governmental action will be successively reviewed at length in Parts I, II, and III. A good deal of what immediately follows about the present and future amount of governmental activity will bear on more than one type.

### THE AMOUNT OF GOVERNMENTAL ACTIVITY AT THE PRESENT TIME

The restrictive function of government does not now seriously interfere with freedom of communication in the United States. The present legal limitations arising out of the desire for national security and the requirements of decency, if properly applied, give writers wide liberty to say what they think. This bright scutcheon has some blots on it, such as occasional arbitrary decisions by postal authorities and the severe state syndicalism statutes, which have been vigorously used against the radical subsidiary press and especially against pamphlets and handbills. Still, compared to what Continental governments have done, the control as it operates in practice is pretty mild. Existing restrictions may fairly be characterized as minimal.

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animal appetites by men who are eager to amass large sums by supplying pornographic post cards to school children. We cannot protect the public by letting producers produce. It was objected that the market for obscenity depends on taboos in our culture and will vanish with these taboos, but there seems to be little chance of this happening while the animality of mankind is imperfectly blended with a high degree of civilization. The market does change from time to time as community standards change; but a market always remains. And hence the community will be strongly impelled to regulate the market.

Thus the Commission does not regard freedom of the press as an absolute, but as one of the most important ideals of society which has to be balanced against other ideals such as the sound training of youth. The complete removal of limitations on mass communications is, in our opinion, neither probable nor desirable.

Still, it is possible to disagree with the libertarianism of the extreme position stated at the outset and yet be hopeful. The prospect that restrictions will never disappear does not necessarily mean that they will increase. They may be like a variable approaching a limit without ever reaching it. Whether the end-point of the process is zero or not does not matter. The question is whether or not we are to progress to more and more freedom.

In order to answer this vital question, we should first try to find and appraise perceptible trends. This search gives little cause for optimism on the part of those who, like myself, share the general position of Milton and Mill about the great value of open discussion to society.<sup>1</sup>

<sup>1</sup> Milton's *Arsenologia* and the second chapter of Mill's *On Liberty* are two of the great presentations of freedom of speech. See also Plato's *Apology of Socrates*.

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### FAVORABLE TRENDS

It is true that some favorable factors exist. Four recent legal situations do show tendencies toward less burdensome restrictions on discussion:

The United States Supreme Court under Hughes interpreted the Constitution and various statutes to give a much wider protection for discussion than was permitted by decisions under White and Taft.<sup>2</sup> This judicial attitude has continued in the present Court.

The federal Espionage Act has been enforced in this war with much more discrimination and leniency than in the last war. A Supreme Court decision in the midst of the war limited the meaning of the phrases of this statute very carefully.<sup>3</sup>

The statute on the exclusion of imported publications and films has been amended to insure judicial review of official action, a highly qualified man has been put in charge of its administration, and he has exhibited notable intelligence in his work.<sup>4</sup>

The Supreme Court has lately refused to let the Postmaster General exclude periodicals from low rates because of his opinions of their contents.<sup>5</sup>

These four examples forecast increasing judgment in the application of the standards which determine what publications are objectionable. Yet these examples show no extensive diminution in the amount of restrictive legislation. The Espionage Act and the federal obscenity statutes are not re-

<sup>2</sup> The important cases are discussed in FSUS, chap. xi.

<sup>3</sup> *Hartzel v. United States*, 322 United States Reports 680 (1944). See below, chap. 16.

<sup>4</sup> The administration of obscenity laws by the Customs is reviewed in chap. 12.

<sup>5</sup> *Equire v. Hannegan*, 327 United States Reports 146 (1946). This case is discussed in chap. 13.

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pealed. Many other federal statutes on the books, which have not yet been much used, could be invoked by an intolerant administration. If so invoked, freedom of the press would depend on juries and on careful judicial interpretation rather than on questions of constitutional invalidity. The Constitution is not going to save us from a very drastic enforcement of some of the statutes if the federal government should choose to make use of them.<sup>6</sup> Furthermore, state restrictive legislation is abundant, and some of it has been applied with great severity.<sup>7</sup> Although the Supreme Court did invalidate a few state statutes, several of its important decisions left the legislation standing and merely held that it had been too loosely construed by the state courts so as to embrace the particular utterances. And we should always remember that much suppression by state and city authorities never gets before the Supreme Court. The local officials may pursue an intolerant policy even if federal officials want to facilitate discussion.

Therefore, the recent legal events just noted give little reason to expect fewer restrictive statutes, although they justify the hope that whatever restrictions we have will be more wisely administered than formerly, especially when they concern the national government.

### UNFAVORABLE TRENDS

Other recent legal events indicate that there will be considerably more restrictions to administer in the immediate future than before 1940. Here are five examples which cause apprehension about the preservation of freedom of the press:

The Alien Registration Act of 1940<sup>8</sup> extended the provi-

<sup>6</sup> See the list of "Present Federal Statutes Affecting Freedom of Speech" in FSUS, pp. 572-74.

<sup>7</sup> See the list in FSUS, pp. 575-97; this omits obscenity laws.

<sup>8</sup> 18 United States Code, secs. 9-13. This is sometimes called the Smith Act. It is fully discussed in FSUS, pp. 440-60. See below, chap. 14.

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sions of the wartime Espionage Act to utterances in peace, not being at all limited to the defense emergency existing when it was enacted. It further included a sweeping federal peacetime sedition law modeled after state syndicalism acts, the first federal legislation of the sort to be adopted since 1798. What is most significant, this drastic legislation met with very feeble opposition in or out of Congress, although a similar peacetime sedition bill in 1920 at the height of the "Red menace" was defeated by the vigorous stand of the American Federation of Labor and the American Newspaper Publishers Association, neither of which raised a peep in 1940.

At least five states have lately excluded certain radical parties from a place on the ballot.<sup>9</sup>

*Strange Fruit*, a much-praised novel on a vexatious social problem, was banned by the action of the Boston and Cambridge police, and their suppression of the book was sustained by the highest court in Massachusetts.<sup>10</sup> Although other parts of the country ridiculed these cities for undue sensitiveness, forces behind the police in Greater Boston are powerful elsewhere and ready to obtain similar suppressions whenever they can, so that there is danger of an ever widening *Index Expurgatorius* of esteemed books.

Group libel bills have been before several legislatures and have considerable backing.<sup>11</sup>

The epidemic of teachers' oath statutes, and the manner of their enforcement in some places, reveals a widespread suspicion toward free minds.

<sup>9</sup> See FSUS, pp. 400-03, 577. On the President's executive order about purging federal officeholders, see letter by four Harvard Law School professors, *New York Times*, April 13, 1947, sec. 4, p. 8E.

<sup>10</sup> *Commonwealth v. Isenstadt*, 318 Massachusetts Reports 548 (1946). See below, chap. 10.

<sup>11</sup> Group libel laws are discussed in chap. 5.



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These measures show a definite tendency to enforce uniform opinions on a nation-wide scale. Totalitarianism, like Spanish influenza, is not confined to the countries of its origin, and America is not wholly immune. Powerful intellectual influences have a way of jumping supposed boundary lines. The Reformation affected the Counter Reformation, and the liberalism of the French Revolution produced temporary advance in Russia, permanent advances in England. So the desire to put schools and publications in step with the ideas of those in power can prove tempting outside Germany and Italy. Although the normal process of the spontaneous growth of opinion is still rather strong in the United States, the study of communication has already shifted to the manipulation of opinion rather than its growth.

Therefore, although we need not be seriously disturbed about any present lack of freedom enjoyed by the press, there is cause for concern over the question how long freedom will last. Legal events since the enactment of the Espionage Act in 1917 show a growing trend toward government interference, despite the contrary influences noted in the Supreme Court and otherwise. So far I have spoken chiefly of the restrictive activity of government. It is obvious that government is increasingly concerned with keeping the channels open and has become, during the war, a definite participant in the process of communication.

Besides the recent legal events to which I have just called attention, there are more deep-seated causes for grave anxiety about the future of the freedom of the press. Modern democratic society is in the greatest crisis of its history, because new conditions have been rapidly created by a technical civilization. The issue is whether the old ideal of a free society can be maintained against the hazards presented by these

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new conditions. Men are constantly called upon to learn over again how to live together. It is a hard task. When unprecedented disputes and difficulties confront them, they repeatedly turn for help to the government, as the recognized umpire. All the traditional liberties are subjected to novel strains, and freedom of the press cannot escape. Many problems of democracy extending far outside the range of this book are bound to influence mass communications. I propose to examine five general factors in the United States which have an indirect but strong tendency to increase governmental control over the distribution of news and opinions.

1. *The growth in functions, range of activities, and interventions of government generally.*—Technical instruments make for a more complete control of many social activities by the government, more particularly in order to redress disproportions and injustices created in the economic process. The same instruments make for a state control of public opinion. To put the point more broadly, the government has got into the habit of intervening in most other businesses, so why should it keep its hands off communications businesses? Why should the tendency toward collectivism stop when it is a question of regulating newspapers?

The physical facilities of communication are essential. Unless these are adequate, any program of free communication will fail. With the growing complexity of these facilities it is harder to keep them open. It did not matter how many packet ships or carrier pigeons brought news of Napoleon's battles—they did not interfere with each other. International radio circuits would. The government is not concerned if a new journal sets up its presses next door to an established organ. It steps in immediately when a new broadcasting station overlaps a used frequency.

## GOVERNMENT AND PRESS TODAY AND TOMORROW

It is true that what has just been said primarily concerns governmental encouragement of the flow of traffic rather than interference therewith. Yet it does have some tendency to increase restrictions as well. The three functions of government in relation to mass communications, described at the start of this chapter, are not separated by high barriers. Whatever makes the government more active in one respect about communications opens opportunities for further activity in other respects. Officials will think more and more about the press and other news agencies. For example, the Federal Communications Commission is mainly occupied with keeping the channels open, but, in so doing, it has been confronted with delicate problems of awarding frequencies to A or B with some attention to the content of their programs. "If A is happy, B is not," and B runs the risk of being put off the air for what he says. Thus far the Commission has suppressed virtually nothing, but the risk remains. Furthermore, if some action by the government happens to affect a newspaper or other communications enterprise adversely, people are likely to suspect that the officials are getting even with their critics, whether or not any such design exists. Admirers of Ralph Ingersoll firmly believed that he was drafted in the hope of wrecking *PM*; and the government's suit to open the channels of the Associated Press was supposed to be due to the hostility of the administration toward the editorial policies of the *Chicago Tribune*. Later I shall consider how the government can best promote communications or participate in them without penalizing persons of adverse views, but at the moment I wish to stress that all governmental activities in the field are in a sense interwoven.

In many subjects the complexity of the pertinent facts increases. Equal access to the facts becomes more and more dif-

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ficult. The power of governments over the sources of information tends to grow. Hence the misuse of this power by governments becomes a more and more serious danger. Governments withhold one part of the facts and use the other for sales talk. This tendency is fostered by general worship of efficient salesmanship. Hence we observe an increasing amount of government activity in the field of what is called "propaganda," viz., the creation by government of various kinds of information and publicity, thus emphasizing and stimulating public interest and response in certain directions at the expense of other interests and ideas. Even when completely devoid of such intentions to falsify and propagandize, governments must make increasing use of communications. A modern government is an ever greater participant in social and economic affairs. This has created a necessity for more extensive and better intercommunication between it and the public in the interests of both. One gets a homely illustration of this by looking at the numerous kinds of placards on the walls of a post office today. How many subjects would not have been a government concern thirty years ago?

On the other hand, a modern government makes great demands for secrecy. Of course, state secrets are nothing new. Military information was always guarded from the enemy, and bureaucrats have often invoked public safety as a protection from criticism. What is significant is the enormous recent expansion of the subjects which officials are seeking to hide from publication until they give the signal. If persuasion fails to prevent leaks, they are tempted to use threats. The result may be a hush-huah attitude, likely to extend beyond the real public need for silence. This is illustrated by Burleson's postal censorship in the last war. A direct consequence of secrecy in the ordinary press may be great activity of the subsidiary

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press in disseminating the concealed material, and this is more dangerous than frank discussion in the general press. One may add that Drew Pearson's rumors are a poor substitute for frank official disclosures. Too often we get as gossip what ought to reach us as regular news.

No doubt there are many matters which ought not to be disclosed for a time, but the officials should not have a free hand to determine what those matters are or to lock them up forever. It may be human nature for them to want their mere say-so to be decisive on the need for secrecy, but the possession of such a power would allow them to hoist public safety as an umbrella to cover their own mistakes. Secrecy has other dangers. The controversy over atomic-bomb control shows how the claim of military security may possibly be used to hamper civilians in proper scientific activity, the progress of which depends on public communication in lectures and learned periodicals. In short, official encroachments on freedom of the press will be probable unless the boundary line between secrecy and publicity is very carefully demarcated. And officials must not do the demarcating. That is a job for the representatives of the people in Congress.

Having shown several reasons why the general tendency of government to expand in all directions is likely to reach the field of mass communications, I shall now go on to situations in the country at large which seem likely to encourage that result.

2. *The centralization of economic power resulting from technological developments.*—A technical society makes for the centralization of economic power, and the drift toward monopoly aggravates the problem of obtaining justice. The same technical tendencies make for large-scale enterprises in the field of communications and present us with the problem as to how

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various sections of the community shall have adequate channels to make their appeal to the conscience and mind of the community. As the instrumentalities increase in quantity and variety, they tend to pass under the control of corporate wealth and like-minded individuals, so that they cease to express fully the diversified interests of the public. Big concentrations of economic power in other industries are also a danger to free speech because they do or can exert direct and indirect pressure upon newspapers and radio stations in various and subtle ways. Hence the government will be inclined to use compulsion on the press with the intent of promoting freedom. Examples of possible resulting government efforts to keep channels open are Sherman Act suits like that against the Associated Press and regulations by the Federal Communications Commission against the networks or against newspaper control of broadcasting stations.

The principle of freedom of the press was laid down when the press was a means of *individual* expression, comment, and criticism. Now it is an industry for profit, using techniques of mass suggestion and possessing great power. A government is always quicker to exercise control when organizations are involved rather than individuals. Is the old principle of the *Areopagitica* applicable to this new situation?

3. *The effect of social complexity in splitting the community into groups.*—The American community is split into groups, with consequent feelings of ill-treatment and outbreaks of violence. Under such circumstances acrimonious controversy in the press may endanger unity. Hence the government may conceivably prohibit such controversy, or encourage people to pour oil on the troubled waters, or do its own pouring.

This split-up situation has further effects on the press. In a complex pluralistic and dynamic society we must pick one set

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of group standards; this inevitably increases tension with all the others. Concentration of newspapers and broadcasting stations in the hands of the wealthy group causes inadequate access to less fortunate groups, a peril to justice. The press then fails to satisfy the need for social health through adequate communications in order to relieve the stresses and strains and class antagonisms caused by increasing industrialization. A widespread belief in the unfairness of the media arises. The challenge to the media as they are now operated, which lies behind all other challenges, is the left-wing challenge; that the means of production are owned and controlled by private groups who are not the servants of the people, not ultimately representative of their interests, and therefore do not fit into a coherent concept of public service. Stalin has compared the Soviet press with the American press and claimed the first is "free," the second "not free" because the people of the United States do not have access to paper, presses, etc. This is not only the classical Communist challenge. It is repeated in one form or another on every progressive level. Some social groups aspiring to recognition feel unrecognized, for instance, the Negroes. Other groups of rising economic importance feel that their new importance is not reflected by the media; this is true of organized workers in their various forms of self-articulation and representation. New workers' parties of every shade complain that capitalist control of the media is used to exclude their case from proportionate ("just") public attention. Even governmental bodies are inclined to regard the press as less progressive than the executive instrument of the constitutional authority. They tend to regard the media as not sufficiently tutored in the realities and responsibilities of public management and less co-operative in the business of government than they think they have reason to expect.

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When a considerable number of people voice a grievance, they bring pressure on the government to do something on their behalf.

While many new groups have grown in power, one element in the community which possessed a great deal of influence at the time of the First Amendment has ceased to have any political importance—the intellectual élite of clergymen, scholars, lawyers, and plantation owners, which comprised not only Federalists but also Jefferson and numerous associates of his. The prolonged retention of preponderating political power by any aristocracy is objectionable, even by the aristocracy of the mind which Jefferson envisaged; but the absence of a recognized intellectual élite in America today does create dangers, which are the price we pay for free education and the largest electorate in the world. Until the middle of the nineteenth century, most writers wrote for a comparatively small group of well-educated men who formed a coherent body of opinion. The rulers and higher officials were members of this group and so followed its standards of literary freedom unless governmental interests were very seriously threatened. The rest of the community did not read much and did not care what was written. Now nearly everybody does read and care, but the standards are variegated. The lack of a strong united front among serious readers in the face of governmental restrictions on the free flow of ideas is illustrated whenever notable books are banned in Boston.

One other aspect of this division into groups has caused much trouble in recent years and is still a motive of governmental interference with the press. The emergence since 1917 of groups which propose to deny freedom if they succeed prompts the state to deny them freedom so that they will not succeed. The newspapers and pamphlets issued by these



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groups often attract attention from other special groups, who constantly demand restrictive measures. Farmers are arrayed against the Industrial Workers of the World, patriotic societies against Communists. The appeal of the "solid citizens" for governmental help is hard to resist.

4. *The effects of large-scale communication on quality.*—A technical society tends to supplant additional and organic forms of cohesion with mechanistic and artificial forms of togetherness. When next-door neighbors do not even know each other, there is no formation of neighborhood opinion. The same technical tendencies replace the old process of talking it out with those around you, by mass instruments of communication in which the common interests of a community are reduced to the lowest common denominator. The Commission was greatly disturbed by the drift toward meaninglessness in the press.

This situation differs from those previously reviewed in that it does not directly impel the government to step in. For example, officials will get more excited about the power of radio networks than about the trivialities of soap opera. The point is that the low level of so much in mass communications will weaken resistance to the government whenever other reasons do lead it to interfere with newspapers or radio or films. When people have come to regard a publication as trash, they do not care much if it is kept from them. They readily forget the underlying issue of the importance of untrammelled discussion. What harm, they think, if something can no longer be published which was never worth publishing anyway. For example, if the Federal Communications Commission should limit the "commercial" element in each broadcast to ten seconds at the start, my first impulse would be to throw up my hat and cheer because I am so sick of the way toothpaste is

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mixed with toccas and cosmetics with campaigns. Yet the implications of such a ruling for administrative dictation of contents would be very serious. Contrast the excitement over the banning of *Strange Fruit*; here was something known to be really good.

The maintenance and breadth of freedom depend ultimately on the toleration of private citizens. Hence it is alarming when a recent *Fortune* survey shows that citizens do not place much value on free speech. One reason for this may be that they do not place much value on what would be suppressed.

5. *The growing importance of mass media as agencies for maintaining unity and co-operative understanding.*—The fact that the instrumentalities of communication reach many more people than formerly tends to make the government more solicitous about them. The Tory government around 1800 left the expensive newspapers to say what they pleased but tried to tax Cobbett's two-penny journal out of existence. Freedom of speech worked well when only five thousand people could hear what was being said and a few thousand more would read some book or pamphlet. Will this principle of *laissez faire* still be allowed to operate when audiences are now to be counted by the million? For example, suppose that television existed in December, 1941, and that an agency was about to send out a transmission of Pearl Harbor during the bombing. Would the government have permitted this? Did liberty of the press then cease to be desirable? The impulse to censor is obviously strengthened by the multiplied distribution of dubious material.

As the war went on, men came to realize that our technical civilization has created a potential world community. Obviously, a community with its citizens widely separated can

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be held together only by mass communications. This raises the problem as to how instruments of communication can be most responsibly used to further the cause of international comity. As the shrinking of world distances has changed the basis of international relations, it has become increasingly important to safeguard the channels of news for the sake of world peace. This factor has its less idealistic side. A government sees its own interests in security, trade, etc., affected seriously by outward and inward communications and so has a strong reason for censoring or guiding them. Consequently, the United States government is bound to participate in the maintenance and management of cables and international radio circuits.

The value of domestic mass communications to the party in power is also becoming obvious. The totalitarians abroad made systematic use of newspapers, radio, and films. This may conceivably influence American politicians. Huey Long showed what can be done, with his sound trucks and his legislation to bludgeon opposition journals into line. Efforts will be needed to avoid this temptation.

Finally, the belief is growing that freedom of the press is so important to the state that it cannot be irresponsibly exercised. It is conceived to be so closely interwoven with the advance of society that it differs from other freedoms. Although this has been described as the Fascist point of view, it is not wholly remote from the position of many citizens who regard themselves as democratic, except that they want responsibility imposed without governmental compulsion. Indeed, insistence on the need of responsibility in the press is the leading theme of the Commission's general report. When men become very much aware of the importance of communications in modern life and are exploring the deficiencies which prevent

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their accomplishing what they might, the question is bound to arise: Why should not the governmental power, which is invoked to remove so many current evils, be asked to step in and straighten out this mess too? There are plenty of reasons for a negative answer, of course, but persons who overlook those reasons may easily make an affirmative reply because of the gloomy picture presented by the large amount of irresponsibility which is now exhibited by many agencies of communication.

### DO THE ESSENTIAL CONDITIONS FOR THE MAINTENANCE OF A HEALTHY PUBLIC OPINION NOW EXIST IN THE UNITED STATES?

Although the foregoing survey shows a predominance of trends toward governmental interference with mass communications, these trends will not inevitably prevail. The chances for successful resistance depend greatly on the existence of a healthy public opinion. It is when society and the press are in a bad way that despotism finds its golden opportunity. Consequently, we need to concern ourselves about the preservation of the essential conditions of healthy public opinion. Two main conditions, somewhat interrelated, may be called the two-way process and the self-righting process.

1. *The two-way process.*—Communication is a two-way process of mutual response between the members of the community. The right to speak implies a readiness to listen and give consideration to what the other man says. A community is a universe of discourse in which the members participate by speaking and listening, writing and reading. In a free community the members establish and re-establish, examine and re-examine, in response to one another, their formulations of man's ultimate ends, the standards of their behavior, and their application to concrete issues. Thus the society in a con-

tinuous enterprise of inquiry and discussion proper its way through changing tasks and conditions; the individual, even if not free from the pressures of his own circumstances, can feel "free" by participating in that enterprise. The First Amendment takes the universe of discourse for granted. It is doubtful whether and to what extent it can be taken for granted under the conditions of life in a modern industrial society. Hence it must be defended.

In Germany during the Hitler regime there was a significant change in the process of communication from two-way discussion to one-way propaganda. As Goebbels formulated it "We no longer want the formation of public opinion, but rather the public formation of opinion." The universe of discourse had broken apart—no discussion or argument was permitted to the Nazis by their leaders. A public opinion which thus is *made* is to be distinguished from one which *grows*.

Therefore, it is not enough to have the right of a free press on parchment in the Constitution. As we look toward the future of this freedom, it is important to know the extent to which this two-way process is working actively. The country is not without dangers in this respect. One danger, already mentioned, is the way we are divided into racial, religious, and economic groups. In every industrial society of large size, forces arise that tend to separate sections of the community from the universe of discourse and thus split the community into parts between which discussion dies out. Workers, farmers, racial minorities, the *gens bien nés* or *bien pensant*, the members of the Union League Club, may finally move in separate worlds.

Fortunately, the process of growth of opinion is still rather strong in the United States (though too little studied in comparison with the manipulation of opinion). Discussion in this

country is still vigorous and alive, and the universe of discourse has not yet been shattered. Consequently, the dangers just indicated can still be met by a deliberate and consistent effort of the national community. The possibilities of action must be constantly explored.

2. *The self-righting process.*—This is the process by which in the long run truth is to emerge from the clash of opinions, good and bad. Milton described it in a famous passage: "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"

The importance of the satisfactory operation of this process for the freedom of the press was constantly stressed at meetings of the Commission. One member said: "A free society presupposes a self-righting process, some sort of ballast. The assumption is that free action in rational minds will result in self-correction, social as well as individual. Now the problem is not whether freedom is good, but whether, given freedom, the self-righting process is in good order, whether the above assumption is being realized. Discussion is not self-correcting in a society which does not use the criteria of a serious search for truth. It is like a cattle ship with the cattle broken loose from their halters. Perhaps we are getting like that. What we want therefore [in our inquiry] is a formulation of the dangers arising from failure to understand and to realize in practice the assumptions which are essential to the workings of a democratic society."

Expressions of similar ideas by others were: "It is material to consider how much immunity to harmful lies the public possesses. This immunity may vary with education and other

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qualities of readers." And, again: "It is important to determine the level at which public discussion is carried on. How far can we count on society to take care of itself?"

That this self-righting process is not working well at the present time was plain to the Commission. It was unquestionably demonstrated to us that the output of the press includes an appallingly large quantity of irresponsible utterances and even deliberate lying. Consequently, some members feared that it is a matter of manipulation or luck what conclusions will emerge from such a tangle. They came to regard Milton's vision of victorious Truth as an illusion. The natural inference was that the government must step in as an umpire in the contest of conflicting opinions and allegations.

Although others were less pessimistic, we were all gravely concerned. To be more specific, the Commission was disturbed by three obstacles to the satisfactory operation of the self-righting process today:

First and foremost is the drift toward concentration of power, which has already been mentioned and is fully set forth in *A Free and Responsible Press*. This is exemplified by the large number of cities with only one newspaper, the common ownership of newspapers and radio stations, and the growth of newspaper chains. Now, diversity in the effective communication of facts and opinions is a fundamental presupposition of the self-righting process. That point is stressed by Judge Learned Hand in the recent case which prevented the Associated Press from denying its services to competing newspapers:

..... The newspaper industry . . . . serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes

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that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.<sup>12</sup>

And Justice Black in the Supreme Court said of the First Amendment:

That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . .<sup>13</sup>

This fundamental presupposition is seriously weakened by concentration of power. Instead of several views of the facts and several conflicting opinions, newspaper readers in many cities, or, still worse, in wide regions, may get only a single set of facts and a single body of opinion, all emanating from one owner.

A second obstacle lies in the present prevalence of sales talk in American life, so that it naturally flows into the press. There is a significant distinction between discussion, which tries to uncover the facts, and sales talk, which is interested in the facts only so far as they further the sale. If the spirit of sales talk prevails over the spirit of discussion, talk can no longer be met with talk. Freedom of speech loses its self-regulating power.

Thirdly, the public reads unfavorable news and opinions about people and policies with more appetite than the favorable. Hence an unfavorable item may be insufficiently counteracted because the opposing item (a) will not be printed or (b) will not be read. As one informant said about news from

<sup>12</sup> *United States v. Associated Press*, 52 Federal Supplement 302 at 372 (So. Dist. N.Y. (1943)).

<sup>13</sup> *Associated Press v. United States*, 326 United States Reports 1 at 20 (1945).



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government departments and business: "Peace, harmony, and brotherly love are not news, *as might be*. And we were told that, even when an editor requests an abundant flow of information about Latin America from the Associated Press, he does not print what he gets unless it is unfavorable to the particular country; then he gobbles it up. This inclination of the public to hear about quarrels and excitement and the unusual makes it hard for them to get a well-rounded understanding of important situations at home and abroad. Often it is the long-run facts which really matter. In the pithy words of one of our number: "The fact that no more dogs are biting men should be bigger news than 'Man bites dog.' "

One existing remedy for this partial presentation of life is that longer articles do get favorable and constructive information to interested readers. The monthly magazines and books are a better vehicle for this than the daily press. Even so, is there adequate counteraction to untrue or lopsided derogatory news?

For such reasons the Commission became critical of the principle of laissez faire, according to which the solution for problems of freedom is more freedom. The following attitude of one of our members fairly expressed our apprehensions: The press fails to bring about that kind of communication of fact and idea which leads to a rational discussion of ends and means. Our society rests upon the assumption that, through the freedom of one to speak and the readiness of others to listen and consider, any divagation of our people from a just course will be corrected by themselves. Today there is reason to suppose that this self-correcting process, although commonly considered to function fully, does not in fact function, to our danger. The eighteenth-century champions of liberty assumed human nature to be like the rest of nature, with an

inner tendency toward harmony, but today men cannot be so complacent. Human society knows no limits to its desires, hence any value can become a peril—even liberty. An analysis of the problem of democracy in general and of the free press in particular proves that there are no such natural harmonies and balances in a community as democratic theory used to assume. Whatever harmony exists at a particular moment may be disturbed by the emergence of new factors and vitalities. Our people have put too much trust in the automatic tendencies of our society to right itself. We have found that we cannot depend on unmanaged processes, whether in economics or in communications. We need more effective methods of self-correction. We cannot rely merely on automatic action. The unity of a society is partly the fruit of moral and political contrivance and is not the inevitable consequence of freedom *per se*. Since purely political contrivance is bound to destroy freedom for the sake of unity, it follows that the preservation of both unity and freedom depends partly upon the achievement of self-control and a sense of high responsibility on the part of the forces which direct the instruments of a society. But the preservation of such unity also depends partly upon the careful and discriminating establishment of such public and political controls as are least inimical to the value of freedom.

The repeated insistence in the foregoing passages on some sort of management of discussion does not necessarily require the government to predominate in the managing, but it implies that, if others do not manage, the government will. Toward the end of Part II, in chapter 24, I shall consider the desirability of governmental intervention for the purpose of improving the quality and accuracy of mass communications. For the time being, I shall merely say that there are alterna-

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tive private influences such as the will of individuals, and schools and colleges, and the press itself, which are capable of raising the level of discussion if they are sufficiently intelligent and vigorous. Even though the self-righting process clanks along pretty jerkily, I am far from ready to abandon the case against abridging the freedom of speech and of the press. How self-righting was England when Milton wrote the *Areopagitica* in 1644?

Some reflections I wrote five years ago still represent my own beliefs:

"Speech should be fruitful as well as free. . . . Lack of interference alone will not make discussion fruitful. We must take affirmative steps to improve the methods by which discussion is carried on. Of late years the argument of Milton and Mill has been questioned, because truth does not seem to emerge from a controversy in the automatic way their logic would lead us to expect. For one thing, reason is less praised nowadays than a century ago; instead, emotions conscious and unconscious are said to dominate the conduct of men. . . .

"Nevertheless, the main argument of Milton and Mill still holds good. All that this disappointment means is that friction is a much bigger drag on the progress of Truth than they supposed. Efforts to lessen that friction are essential to the success of freedom of speech. It is a problem, not for law, but for education in the wide sense that includes more than schools and youngsters. . . .

"Reason is more imperfect than we used to believe. Yet it still remains the best guide we have."<sup>14</sup>

The foregoing discussion has brought out many reasons why the impulse toward governmental activity in the field of

<sup>14</sup> FSUS, pp. 539-41.

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communications will grow stronger in the near future. If that impulse is allowed free play, very great dangers will arise, not only to the press, but also to the continuance of democracy.

So much stress has been laid of late on various economic pressures and forces which warp mass communications that there is some risk that the American people will lose sight of the evils of a government-controlled press. It is right to emphasize these economic influences, as the general report of the Commission does. Immunity from state action is not enough; the press should also be independent of private forces which prevent it from giving society the kind of mass communications which society needs. Yet nobody should fall into the opposite error of assuming that economic obstacles are the only impairments of freedom or that a press which is dominated by the state is free merely because it is dissevered from all capitalistic controls. The meaning which our ancestors gave to liberty of the press, namely, freedom from the will of legislators and officials, is just as vital today as it was in 1791. It is constantly important for the public to realize the indispensability of freedom of the press from governmental control so that they can fight for it with a clear idea of what they must defend.

This does not mean that all state activity in the field of communications is necessarily bad. The rest of this book will be largely devoted to determining what governmental participation is wise, and what is unwise so that the evils ought to be remedied in other ways.

The point is that unwise state activity must be steadily resisted, because otherwise it is likely to come to pass in response to numerous conditions of the United States today. The First Amendment is a gun behind the door which must never be allowed to rust.



**PART I**

**USE OF GOVERNMENTAL POWERS  
TO LIMIT OR SUPPRESS  
DISCUSSION**



## 2

# GENERAL CONSIDERATIONS AS TO GOVERNMENTAL RESTRICTIONS

### THE UNITED STATES CONSTITUTION

**I**N THE United States the restrictive powers of the federal government over communications are limited by the First Amendment to the Constitution, which was drafted by James Madison to meet demands by the ratifying conventions of several states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

State governments were not affected by the adoption of this amendment in 1791. Then, and for over a hundred and thirty years, state legislatures and state officials could suppress opinions as they chose unless restrained by the free-speech clauses of state constitutions. Despite some differences in wording, the state clauses seem substantially equivalent to the First Amendment, but they might be construed narrowly by a state court to permit some particular restrictive law without any possibility of a check by the United States Supreme Court. This local autonomy over communications was cut short in 1925. Since then, the provisions of the First Amendment have been substantially applied to state governments by a some-



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what roundabout method. After the Civil War the Fourteenth Amendment had imposed new restrictions on the states:

No State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States*; nor shall any State deprive any *person of . . . liberty . . .*, without due process of law. . . .<sup>1</sup>

Although this amendment was adopted in 1868, its consequences to freedom of discussion were long unrecognized. At last in the *Gillow* case in 1925<sup>2</sup> the Supreme Court held that the "liberty" protected from arbitrary state interference includes liberty of speech. This was soon extended to embrace liberty of the press.<sup>3</sup> Freedom of assembly was later brought within the Fourteenth Amendment.<sup>4</sup> Finally, liberty of religion was added.<sup>5</sup> Thus the states may now be prevented by the Supreme Court from doing substantially everything which the First Amendment forbids.

We are concerned with freedom of the press rather than with freedom of speech generally. Does the separate recognition of these two privileges in the First Amendment have any importance for us? Is constitutional "freedom" somewhat different in scope for "the press" than for "speech"? Not for the most part. They appear virtually to coincide as legal concepts. I have not found the courts mentioning any significant differ-

<sup>1</sup> *My italics.*

<sup>2</sup> *Gillow v. New York*, 268 United States Reports 552 (1925). See FSUS, pp. 315-25.

<sup>3</sup> *New v. Minnesota*, 233 United States Reports 697 (1931); *Grosjean v. American Press Co.*, 297 United States Reports 233 (1936). See FSUS, pp. 375-84.

<sup>4</sup> *Hague v. C.I.O.*, 307 United States Reports 496 (1939). See FSUS, pp. 469-83.

<sup>5</sup> *Cantwell v. Connecticut*, 310 United States Reports 296 (1940). See FSUS, pp. 494-5. As to the possibility of an established church in a state, such as once existed in Massachusetts and Connecticut, see *Emerson v. Board of Education of Eving*, 87 Supreme Court Reporter 594 (1947).

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ence between these two freedoms in that respect. There is, however, a difference in fact so far as governmental control is concerned, for newspapers are more vulnerable than speakers. The government (unless checked by the Constitution) can impose restraints on them which would not be applicable to orators, like heavy taxation as in Tory England and Louisiana, requirements of large bonds guaranteeing against violations of libel or sedition laws, injunctions against future issues, exclusion from the mails, etc.

It is also worth noting that hitherto "the press" has been interpreted rather narrowly by the courts. They have been inclined to limit it to the popular sense of newspapers (and probably books and pamphlets), without embracing other media of communication such as motion pictures and the radio which our Commission regards as part of the press. There is such a strong tradition in favor of the immunity of printed matter from governmental interference that courts are much quicker to jump on restraints upon newspapers than restraints upon novel media which lack the benefit of the tradition. This difference in attitude is important in connection with motion picture censorship and control of the radio, as will appear later.

The Constitution will not figure largely in this book. Issues as to the validity of particular statutes or administrative orders often involve technical legal discussions which would greatly impair the interest of what I have to say. Our main concern is with the wisdom of various methods of control without regard to the precise formulation of statutes and orders. It is true that constitutionality and wisdom sometimes coincide, but this is not necessarily so. On the one hand, it may be unwise for the government to adopt a restriction which would be upheld by the courts as constitutional. On the

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other hand, it may be unwise for a medium of communication to press its activities up to the full limit which the Constitution permits. It will be profitable for us to concentrate on considering what is desirable for both the government and the medium to do in a particular region of conflict.

At the same time, an occasional reference to an opinion of the Supreme Court may be helpful. Constitutional freedom of the press is not regarded by the Court as an absolute right but is shaped by the affirmative governmental powers which are recognized in other parts of the Constitution for the federal government and reserved to the states by the Tenth Amendment. Similarly, our Commission has refused to take an absolutist view of freedom of the press. We realize that, as a matter of wisdom, it must be balanced against other important ideals. Since the Supreme Court is also engaged in a process of balancing, we can sometimes find help in the examination which the Justices have made of the relevant factors in a given situation and their proper respective weights in the scale.

Before leaving this topic, I should like to emphasize two very important effects which the First Amendment has upon American problems of freedom of the press.

In the first place, it establishes outer barriers beyond which the Supreme Court will not let government go. Despite the considerable range of conceivable restrictions, there is a point at which the Court will interfere. We are not much concerned over the exact location of that point, but the fact that it exists is significant for us.

A second consequence of the First Amendment is much more important for our purposes. It raises the banner of freedom of the press where all citizens can see and respect it. Constitutional recognition prevents freedom of speech from

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remaining an ideal of radicals or of isolated thinkers like Milton and Mill or of any other special group such as professors and newspaper owners. These men would probably cherish the ideal without the First Amendment, but that ideal would then lack a large portion of the emotional force which it now possesses. Its embodiment in a very prominent place in the Constitution proclaims it to every school child. No enthusiast can assert his devotion to the Constitution without simultaneously paying at least lip service to the principles of free speech and free press. It is just as much a part of the Constitution as the war power or the election of a President. What might otherwise be the forlorn hope of eloquent highbrows and frustrated lowbrows has a strong hold upon everybody in the United States.

This emotional power of the First Amendment tends to protect much discussion which lies well inside the outer barriers within which the Supreme Court has confined government restrictions. Officials are sensitive about appearing in the eyes of the public to infringe upon free speech and press even when judicial sanction is probable. In times of excitement, energetic supporters of toleration will spring up among conservatives who detest the ideas they want left alone. The desire of fanatics to stamp out whatever they think objectionable can sometimes be diverted by an appeal to the words of the Constitution.

Plainly the strength of this extra-judicial influence of the First Amendment will depend considerably on the extent to which its words possess content and life for the great mass of citizens. If they remain mere words, no matter how fervently they be worshiped, the right to free speech may easily come to count for as little as the right to bear arms in the succeeding amendment. Free speech will continue to be revered as a

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phrase, but the exceptions where suppression is conceived to be legitimate will include all the situations where free speech really matters, as when Postmaster General Walker considered the *Esquire* case unconnected with free speech. On the other hand, the more understanding people have of the political and ethical policies which the First Amendment embodies and of the concrete situations to which these policies apply, the more patient they will be toward heterodox opinions, the less insistent on governmental action. And officials will become correspondingly reluctant to hamper the fruitful flow of communications. Courts can do very little to protect a free press. In the end, the people are likely to get about as free a press as they want.

### ARGUMENTS AGAINST GOVERNMENTAL RESTRICTIONS

It is best to begin with the arguments for free speech. This is true of any concrete controversy involving that right. If people start by considering the possible dangers from what is sought to be suppressed, they will readily become so alarmed by the catastrophic prospect that they will have hardly any mental energy left to apply to the advantages of open discussion. If at the outset they recall the traditional importance of freedom of speech and the gains from toleration, then the threatened evils seem much less likely to occur. The great gap between present talk and future acts becomes plainer.

Since a book written for the Commission by a fellow-member deals especially with the principles of freedom of the press and considers both sides, I shall not make an exhaustive statement of the arguments for drastically limiting government restrictions<sup>\*</sup> but shall simply set down a few significant points

<sup>\*</sup> William Ernest Hocking, *Freedom of the Press: A Framework of Principles* (Chicago: University of Chicago Press, 1947). For a longer presentation of my views, see FSUS, chaps. i and iv, and Index to that book (pp. 323-33) under "Speech, Freedom of, Arguments."

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which were brought out during the debates in the Commission.

*New ideas should be able to get started.*—A fact which largely accounts for the practical and spiritual advantages of a free society is that all kinds of views and ideas are at least able to get themselves started and make their appeal to the consciences and intelligence of the individuals composing the society. This advantage would obviously be nullified if the preferences and prejudices of the government, even where the government expresses a majority point of view, should be able to stifle and eliminate ideas and views which might happen to be unpopular because of their novelty or because they are confined to a minority group within the society. Therefore it is an absolutely essential feature of any free society that there should be the very widest freedom of utterance, publication, and discussion.

*Freedom is essential to the re-examination of standards.*—Although a community needs standards of conduct and aspiration which are generally respected and observed, their applications and even the standards themselves must in a free society be subject to constant re-examination. This is impossible without free communications. As one of our members put it: "A free society is one which is free for ends of justice and goodness, as these ends are defined and redefined through common living, rational discussion, and compromises. A free society is one in which men are free to make intelligent choices and in which men have the will to choose to move in the direction which they, separately and collectively, believe to be right."

The foregoing statement describes the ideal of a free society, which is never attained but should be sought. An "actual free society," another member observed, "must be one in

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which individuals are free, to a considerable extent, to go wrong as well as to go right; but it can't stay free unless there is enough of the will to move in right directions to enable this force to hold the upper hand, even though precariously."

A book review by Merriam, written long before his work on our Commission, best expresses what I have in mind:

"Society is dissolving every moment, and the question is, How shall the reconstruction of authority in the minds and lives of men be made? In the past largely by the authoritarian process, by taboo, superstition, ignorance, and force. In our day this is still largely true, perhaps, but there is also an increasing process in which authority is maintained by recreating appreciation of and agreement with the values that are transmitted, with allowance for shifting values and attitudes and interests. That order of things whether social, economic, or political, is now most secure which constantly recreates the loyalty and obedience of its members, which constantly redevelops the sources of its interest and power from interest and reflection. That order is weakest which must largely depend upon authority and force with suppression of discussion and reason and criticism."

*Freedom is necessary for popular participation in political processes.*—Freedom to participate in the making of decisions carries with it the freedom to take a positive part in the process—to speak out; also it involves freedom of access to facts and interpretations ("freedom to speak," "freedom to listen"). Liberty of speech and of the press may be described as public opinion in the soft. Open discussion eventually culminates in votes. This political aspect of freedom of speech has recently received much attention from the Supreme

<sup>1</sup> Book review, 27 *American Journal of Sociology* 27 (1921).

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Court. And the value is still broader; it goes beyond what men do at the polls.<sup>4</sup> One of our members described freedom of the press as an aspect of the liberty to develop increasingly elaborate and wholesale methods of conveying thought, feeling, and resolve, so as to prepare that common mentality which is the necessary prelude to all common action.

*Freedom makes possible the victory of long-time aims over short-time aims.*—Immediate objectives can sometimes be accomplished only through suppression, but this may impair purposes which are more remote in time and yet more important. This conflict between short-time and long-time aims is especially noticeable in the community of nations. It is illustrated by the present inclination to suppress unpalatable facts about South American countries in order to avoid causing resentment there. Here is a short-run aim in operation. But the long-run result may be a less perfect understanding of these countries. One of the main advantages of the Bill of Rights is to protect certain fundamental long-time aims from being sacrificed to short-time aims by the existing organs of government, particularly when officials are tempted to act in response to popular excitement which will eventually be modified by sober thinking.

*Freedom protects us from the mistakes of those in power.*—Although open discussion sometimes leads to evil acts, the argument is that freedom of the potential "controllers" would be no better. By and large, worse calamities would result if those in power at the moment could manage affairs without having their conduct and policies subjected to a thorough-going review. Such a review may point out errors or operate as a deterrent or eventually cause a change of rulers. Another

<sup>4</sup> See the opinion of Justice Jackson for the Court in *West Virginia State Board of Education v. Barnette*, 319 United States Reports 624 (1943).



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phase of the same argument is the idea, attributed to Franklin, that though we may recognize the desirability of censorship of evil thoughts, the question remains whether any human being is good enough and wise enough to be the censor. Even if an agency with power to limit the press were honest, it would still have a viewpoint and it would select the material for publication so as to further this viewpoint. During a conference of the Commission one member was stressing the worthlessness of some kind of publication and the consequent desirability of official power to suppress it. Another member observed that we cannot construct a dichotomy of a wise government over against foolish writers. Officials are not inevitably wise or their standards inevitably the best for society. Only through open discussion can the merits of official views be tested.

In all free-press problems it is essential not to think of The Government as some mystical omniscient entity—a sort of immortal and infallible George Washington. There is no perfect government which can step in to regulate an imperfect press. The federal government is actually an assemblage of congressmen and Washington officials, who have as many human failings as newspaper editors and owners. And it is not merely a question of the federal government. A good deal of the controlling which is urged would have to be done by states and cities, which are close enough to us for us to see plainly that they are just groups of human beings of varying amounts of wisdom and fairness. The men who would inspect newspapers or license books are not very different from the men who now inspect dairies or license the issue of corporate securities. Of course, much of the regulation of business is done very satisfactorily, but regulation of communications industries creates peculiar temptations for politicians. It makes it

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easy for them to silence hostile criticism and mold the press for the purpose of increasing popular support for the policies of the party in power and their own continuance in office. The framers of the First Amendment were well aware of such dangers; they remembered the proceedings against Zenger and Wilkes and the publisher of the *Letters of Junius*.

*Freedom preserves human dignity.*—"Good," as Emerson says, "does not mean good to eat and good to wear." It means to live our own lives as fully as we can and to bear witness to the truth for which we came into the world. Socrates in his speech in his own defense valued the liberty to talk more than life.

"If in acquitting me you should say: 'We will not put faith this time, O Socrates, in your accusers, but will let you go, on the condition, however, that you no longer spend your time in this search nor in the pursuit of wisdom, and that if you are caught doing either again you shall die'—if, I say, you were to release me on these conditions, I should say to you: 'Athenians, I love and cherish you, but shall obey the God rather than you; and as long as I draw breath and have the strength, I shall never cease to follow philosophy and to exhort and persuade any one of you whom I happen to meet. For this, be assured, the God commands; and I believe that there has never been a greater good in the state than this my service to the God; for I do nothing but go about persuading you, both young and old, not to let your first thought be for your body or your possessions, nor to care for anything so earnestly as for your soul.' And, Athenians, I should go on to say: 'Either hearken to my accusers or not, and either acquit me or not; but understand that I shall never act differently, even if I have to die for it many times.'"

*With freedom of the press we get a much better kind of con-*

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*munity to live in.*—As the years go by, this argument weighs more with me than any other. The persistent enforcement of sedition laws and other kinds of suppression of thought requires spies and informers and creates an atmosphere of suspicion and timidity. Perhaps this is stating the human dignity argument in a different way. "You make men love their government and their country by giving them the kind of government and the kind of country that inspire respect and love country that is free and unafraid, that lets the discontented talk in order to learn the causes for their discontent and end those causes, that refuses to impel men to spy on their neighbors, that protects its citizens vigorously from harmful acts while it leaves the remedies for objectionable ideas to counter-argument and time."<sup>9</sup>

## REASONS FOR GOVERNMENTAL RESTRICTIONS

Why do these arguments, and many more, often fail to prevent suppression? Partly, of course, on account of the vivid apprehension of specific evils like sexual promiscuity or violent revolution if detested opinions be allowed to spread. (The important relation of these evils to a free press will be considered later.) Yet this is not the whole story. Even when these specific fears are dormant, more generalized reasons for opposition are at work in people's heads. Aside from the present-day conditions already summarized as tending to favor governmental restrictions on the media of communications, there are at least three long-standing and widely prevalent mental attitudes which encourage a lack of hospitality toward open discussion.

*A longing for national unity in accordance with a set of deeply cherished national traditions.*—Although controversies within

<sup>9</sup> FSUS, p. 565, part of a longer exposition of this argument.

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the range of variation permitted by the national ideal are readily permitted, the suggestion of any doctrine antagonistic to this ideal arouses strong resentment. The ideal itself is imperiled. The nation is set on a cherished course and must not be diverted. This implicit devotion to a communal ideology has assumed tremendous prominence of late in certain European countries, but there is nothing new about the general attitude. Something of this sort in ancient Athens led to the death of Socrates. Advocacy of compulsion to protect established communal purposes plays a considerable part in the most powerful attack in English I know upon the views of Milton and Mill—*Liberty, Equality, Fraternity* by James Fitzjames Stephen (1874). It is characteristic of this devotion to an ideology to praise unquestioned obedience—"Theirs not to reason why"—as a virtue much more worth cultivating than free criticism. Stephen writes:

" . . . To obey a real superior, to submit to a real necessity and make the best of it in good part, is one of the most important of all virtues—a virtue absolutely essential to the attainment of anything great and lasting. . . . To be able to recognize your superior, to know whom you ought to honour and obey, to see at what point resistance ceases to be honourable, and submission in good faith and without mental reservation becomes the part of courage and wisdom, is supremely difficult."<sup>10</sup>

Although we cherish the democratic ideals which Stephen was attacking and detest dictatorial control over opinions, as revealed in contemporary Europe, the conception of a tightly integrated national ideal is by no means wholly alien to the United States. For example, it is evidenced by the popular phrase "one hundred per cent American," by teachers' oath

<sup>10</sup> *Liberty, Equality, Fraternity* (1874), p. 129.

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laws, by compulsory flag salutes, by the desire of various groups of nonhistorians to control the writing of histories for schools.

*Contempt for the process of discussion.*—Why bother to protect anything which is not worth while? Here again Stephen typifies the attitude. Mill's assumption, he says, is:

"There is a period, now generally reached all over Europe and America, at which discussion takes the place of compulsion, and in which people when they know what is good for them generally do it. When this period is reached, compulsion may be laid aside. To this I [Stephen] should say that no such period has as yet been reached anywhere, and that there is no prospect of its being reached anywhere within any assignable time.

"Where, in the very most advanced and civilised communities will you find any class of persons whose views or whose conduct on subjects on which they are interested are regulated even in the main by the results of free discussion? . . . . The lion's share of the results obtained is due to compulsion, and . . . . discussion is at most an appeal to the motives by which the strong man is likely to be actuated in using his strength. Look at our own time and country, and mention any single great change which has been effected by mere discussion. Can a single case be mentioned in which the passions of men were interested where the change was not carried by force—that is to say, ultimately by the fear of revolution. . . . The minority gives way not because it is convinced that it is wrong, but because it is convinced that it is a minority."<sup>11</sup>

Macaulay reacted somewhat similarly after reading Mill: "Every writer seems to aim at doing something odd,—at defying all rules and canons of criticism. . . . So great is the

<sup>11</sup> *Ibid.*, pp. 29-31.

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taste for oddity that men who have no recommendation but oddity hold a high place in vulgar estimation. I therefore do not at all like to see a man of Mill's abilities recommending eccentricity as a thing almost good itself."<sup>12</sup>

*Great confidence in one's own judgment, with a correspondingly low estimate of the general run of people.*—It is easy for most of us, when confronted with printed matter which we find highly objectionable, to assume that we ourselves are amply qualified to appraise its unsoundness and at the same time that ordinary readers must not be allowed to see it because they cannot be trusted to detect the untruths and fallacious reasoning. They will believe every word of it and act accordingly. If it questions current conceptions of marriage, they will rush into an orgy of licentiousness. If it vituperatively attacks rich men, the gutters will soon run with blue blood. So the shocked citizen begins to wonder whether the government ought not to do a good deal more suppressing. He tends to think as if he himself were one of the deciding officials. At least he assumes that they will always belong to his crowd. He is slow to think of the possibility that he or they may be fallible human beings, or of the danger that a policy of suppression once established may be used against the expression of his own views. To quote Stephen for the last time:

"How many people are capable of understanding the fundamental principles of either political economy or jurisprudence? . . . Men are so constructed that . . . there are and always will be in the world an enormous mass of bad and indifferent people—people who deliberately do all sorts of things which they ought not to do, and leave undone all sorts of things which they ought to do. Estimate the proportion of men and

<sup>12</sup> *Life and Letters of Lord Macaulay*, ed. Trevelyan ("Longman's Silver Library" ed. [1900]), p. 671.

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women who are selfish, sensual, frivolous, idle, absolutely commonplace and wrapped up in the smallest of petty routines, and consider how far the freest of free discussion is likely to improve them."<sup>13</sup>

No doubt, the level at which discussion is carried on ought to be considered in connection with the general problem of freedom of the press, as we saw in chapter 1 while discussing the two-way process and the self-righting process. Yet censorship and prosecutions may not be the best methods to produce public immunity to lies and strengthen the power of citizens to pass judgments on their own welfare. Other ways are open to reform, if reform be needed, such as better schools and numerous plans for developing the critical faculty in adults (including ourselves).

As President Horton of Wellesley once pointed out, modesty naturally accompanies free speech. We must beware of being arrogant about our own judgment and of placing too low an estimate on the intelligence of other people. Justice Holmes used to enjoy saying that the first lesson of philosophy was to learn that you are not God. The more one realizes the uncertainties of his own conclusions, the less eager he is to set up himself or anybody else as a censor.

The foregoing points have to be reckoned with, but they do not affect the soundness of the arguments for liberty of the press, only their chances of success in actual life. By contrast, the next and last argument for governmental restrictions is valid so long as it is not given too much weight.

*Restrictions may be necessary to prevent words from ripening into dangerous acts.*—The mere tendency of the publication to produce such acts is sometimes made the reason for suppression, but this is going much too far. Such a test of remote

<sup>13</sup> *Op. cit.*, pp. 33-34.

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tendency would stamp out many valuable presentations of facts or opinions. For example, the desire to nip revolution in the bud would justify the censorship of Jefferson's "I hold a little rebellion now and then is a good thing" and Lincoln's First Inaugural: "Whenever they [the people] shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it."

### BALANCE OF THE SOCIAL INTERESTS OF PUBLIC SAFETY AND SEARCH FOR TRUTH: THE TEST OF CLEAR AND PRESENT DANGER

The Commission, of course, rejects this extreme "remote tendency" theory, but at the other extreme it rejects the absolutist view that eventually there should be no restrictions at all.<sup>14</sup> We think that some restrictions will be required in the sort of society we envisage for a long time ahead, but we insist that they should be kept at a low level—be "minimal." Our position was summed up by one of our members:

"We want a society with certain characteristics: freedom as an end in itself to say, think, and do (as in Mill and Milton); order and security as an end in itself; freedom of the society to define its ends and find means for them. Now these characteristics require compromises among themselves. We cannot have everything that everyone wants in all these respects; we must have restrictions to make adjustments, attain a balance. What are these restrictions? The media of communication must be such that, under these restrictions, they make such a society possible."

This compromise solution corresponds with the position of the Supreme Court in construing the First Amendment. To

<sup>14</sup> This view is discussed early in chap. 1.



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make the nature of the compromise as plain as possible, I take the liberty of quoting passages of my own:

"The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected."<sup>15</sup>

"The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for, as Bagehot points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom."<sup>16</sup>

It is not easy to fix the precise point where restrictions on speech become permissible as a result of this balancing. The Supreme Court has, on the whole, fixed it by the "clear and

<sup>15</sup> FSUS, p. 35.

<sup>16</sup> FSUS, p. 31.

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present danger” test, which was first formulated by Mr. Justice Holmes in 1919:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.<sup>17</sup>

In his famous dissenting opinion in the *Abrams* case he explained “present” thus:

Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law abridging the freedom of speech.”<sup>18</sup>

And Mr. Justice Brandeis expanded the idea of “present” in his dissenting opinion in the *Anita Whitney* case:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is, therefore, always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.<sup>19</sup>

<sup>17</sup> *Schenck v. United States*, 249 United States Reports 47 (1919). See FSUS, pp. 80-82.

<sup>18</sup> *Abrams v. United States*, 250 United States Reports 616 (1919). See FSUS, pp. 108-40.

<sup>19</sup> *Whitney v. California*, 274 United States Reports 357 (1927). See FSUS, pp. 343-54.

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Moreover, as Mr. Justice Brandeis pointed out, even imminent dangers cannot justify a prohibition of the functions essential to effective democracy unless the evil apprehended be relatively serious. The danger must be "clear":

Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society.

The classic illustration of "clear and present danger" is Holmes's example of the man who falsely yells "Fire!" in a crowded theater.

Important as this clear-and-present-danger test is, it is probably not a key which opens all doors.<sup>20</sup> Some of the difficulties are worth noting.

1. Despite its frequent recognition by the Supreme Court, the requirement of imminence of the danger ("present") has not taken hold of legislators. It is persistently ignored in state syndicalism acts which are still on the books, and Congress paid little attention to it in enacting the drastic sedition clauses of the Alien Registration Act of 1940.<sup>21</sup>

2. Even in the Supreme Court the test has been almost wholly applied to political and economic discussion. It has served to protect such discussion against sedition prosecutions and contempt of court for attacks on judicial conduct.<sup>22</sup> But where is the "present danger" in film censorship, which the Court has permitted?<sup>23</sup> No doubt, immunity for political and

<sup>20</sup> For thoughtful recent criticisms of this test see Herbert Wechsler, "The Clear and Present Danger Test," in *Handbook of the Association of American Law Schools* (1940), p. 53, reprinted in 9 *American Law School Review* 881 (1941); Mark D. Howe, book review, 55 *Harvard Law Review* 895 (1942).

<sup>21</sup> See FSUS, chap. xii, and below, chap. 14.

<sup>22</sup> *Bridges v. California*, 314 United States Reports 252 (1941), discussed in chap. 15.

<sup>23</sup> *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 United States Reports 230 (1915), discussed in chap. 11.

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economic discussion is very important because of its direct connection with the political process, in which literature, art, and religion are much less likely to participate. Yet the framers must have had literature and art in mind, because our first national statement on the subject of "freedom of the press," the 1774 address of the Continental Congress to the inhabitants of Quebec, declared: "The importance of this [right of freedom of the press] consists, besides the advancement of truth, science, morality and *arts* in general, in its diffusion of liberal sentiment on the administration of government."<sup>24</sup>

The importance of freedom for literary and artistic expression is plain, although it lies outside the central preoccupations of this book. We do not yet know that the Court will refuse to apply the clear-and-present-danger test to such matters, because the point has not been raised since the test was formulated, but the Flag Salute cases are significant. It is hard to find any clear and present danger which a state can avert by compelling small children to engage in this ceremony which they believe to be idolatrous. Nevertheless, the Court began by sustaining such laws without reference to the absence of present danger.<sup>25</sup> Later, the Court did upset the compulsory flag salute but still refrained from stressing the test.<sup>26</sup> Both decisions concentrated on a comparison between the importance of the purpose of the law and the importance of the liberties which this law limited. The divergence was about the weights at the two ends of the scale. Both decisions were

<sup>24</sup> My italics.

<sup>25</sup> *Minersville School District v. Gobitis*, 310 United States Reports 586 (1940).

<sup>26</sup> *West Virginia State Board of Education v. Barnette*, 319 United States Reports 624 (1943).

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silent as to the lack of any immediate danger to national unity if a few school children were excused from saluting the flag.

These cases and several others indicate that, outside the political and economic area at least, "clear danger" is a more vital part of the test than "present danger." The examination is focused on the relative seriousness or triviality of the evil which the law seeks to prevent as compared with the value of the infringed liberty. If the evil is found to be substantial, the law seems likely to be upheld regardless of the unlikelihood that the evil will ever come to pass.

This concentration on the seriousness of danger raises novel and perplexing problems. Thus Mark D. Howe asks:

"Where may the consideration of the new question of law carry the courts? Our present national fear is not primarily that domestic fascists or communists will overthrow the Government by internal violence; our principal worry is that the traditional American way of life will be undermined by the infection of public opinion. Although there may be no clear and present danger of violent revolution, there are many responsible persons who believe that the threat of a diseased morale is immediate. If that is a danger with which the legislatures may legitimately be concerned, . . . is it not quite possible that statutes clearly invalid in the terms in which Holmes considered them, and in which they have been enacted, namely in terms of the danger of immediate violence, may have acquired a new constitutional justification?"<sup>27</sup>

3. It is very hard to fit into the clear-and-present-danger test certain parts of the law which have been hitherto accepted without question, such as the legal rules about profanity, criminal libel, and obscenity. Of these, obscenity law has the most effect on the press. What is the substantial and

<sup>27</sup> 55 Harvard Law Review at 699.

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immediate danger here? If we say that the social injury to be prevented consists in a notable increase of illicit intercourse, then the alleged indecent book or magazine ought not to be suppressed unless it is reasonable to think that it will produce an orgy of licentiousness in the near future. What sensible man would apprehend such a consequence from Dreiser's *American Tragedy*, for selling which a bookseller's conviction was upheld by the highest Massachusetts court?<sup>28</sup> Can we therefore expect that the United States Supreme Court would upset such convictions as an unconstitutional deprivation of "liberty" under the Fourteenth Amendment? It would be rash so to prophesy. A similar criterion would greatly limit the powers of the Postmaster General to exclude undoubtedly obscene matter from the mails. Even grossly indecent publications, which are in quite a different class from Dreiser or *Strange Fruit*, are hardly likely to produce any significant decline in the marriage rate or increase of indecent acts. Take, for example, a case in the Supreme Court itself of a prosecution for depositing "obscene, lewd, or lascivious and . . . filthy . . ." matter in the mail.<sup>29</sup> Limehouse, the defendant, had written about thirty letters, which contained much foul language and charged the recipients or persons associated with them with sexual immorality and in some cases with miscegenation. Obviously, this filth was not calculated to induce sexual immorality. Now the significant point for us is that this absence of danger of unlawful acts made no impression whatever on Mr. Justice Brandeis, who wrote the opinion upholding the charges, although he was the very judge whom we have seen insisting on imminent danger in cases of political discussions. He considered the lack of sexual incite-

<sup>28</sup> *Commonwealth v. Friede*, 271 Massachusetts Reports 318 (1930).

<sup>29</sup> *United States v. Limehouse*, 285 United States Reports 424 (1932).

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ment immaterial, because the letters were squarely within the word "filthy" in the statute. He did not bother to ask what was the danger created by filth in the mails but took it for granted that Congress had power to punish it.

One can make a valiant effort to bring cases of gross indecency like the *Limehouse* case within the clear-and-present-danger test by saying that the social injury here sought to be prevented is not future immoral conduct but something quite different. The purpose of the law is to protect readers from the serious shock to their sensibilities. This is an immediate injury which takes place the moment that indecent language is seen or heard. It is the same explanation as that commonly given for laws against profanity. Profane and grossly indecent matter does not form an essential part of an exposition of ideas, and it has a very slight social value as a step toward truth. Those are the interests which we normally consider in advocating freedom of speech, but they play practically no part here. They are clearly outweighed by the social interest in the peace of mind of those who hear and see. Words of this type offer little opportunity for the usual process of counterargument. The harm is done as soon as they are communicated or is liable to follow almost immediately in the form of retaliatory violence. The words are criminal, not because of the ideas they communicate or their liability to produce future immoral acts, but because they are really like acts in causing immediate disagreeable consequences to the five senses. The man who uses foul talk in a streetcar is as much of a nuisance as the man who smokes there.

It is possible that this explanation suffices for some obscenity cases, like the *Limehouse* case, although Brandeis did not see fit to invoke the explanation. However, this argument will not work for all obscenity situations, especially not for

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those which raise the most controversy. The objection which the Watch and Ward Society makes to many of the books it wishes to suppress is not that these books offend readers but that they delight them. The ban is often placed on books and plays in which disgusting words are either absent or very infrequent. The true fear of the censor is that the ideas set forth will in the long run undermine our present system of marriage and morality. This brings us right back to the danger of future acts, which are in fact remote. Furthermore, publications of this sort do plainly involve ideas and thus touch the social interest in truth. The suppression of *Strange Interlude* in a Boston theater is a good example. Even where a book contains a few shocking words, like *Strange Fruit*, the argument of protection of the public senses from immediate offense is frail indeed. When the words occur almost at the last page, very few people are going to be offended by them unless they deliberately go to the trouble of hunting them out. The situation is very different from that of a billboard displaying posters of nudity on a crowded street.

Criminal libel cases raise somewhat the same difficulty. The common explanation is that the words punished are liable to produce a breach of peace on the part of readers. Yet, under modern law-abiding conditions, there is very small likelihood that anybody will be physically hurt because a placard on Boston Common describes as a murderer the governor who allowed Sacco and Vanzetti to be executed.<sup>20</sup>

These perplexities cannot be cleared up in this book, but they suggest a few observations.

The method of balancing the interests involved is a general-

<sup>20</sup> The conviction was sustained in *Commonwealth v. Cantor*, 200 Massachusetts Reports 269 (1929), noted in 48 Harvard Law Review 693.



## RESTRICTIONS IN GENERAL

ly valid approach to any free-speech situation, with insistence upon great weight for the policies favoring freedom. On the other hand, the clear-and-present-danger test is perhaps not generally valid. It is a helpful description of the resolution of forces in some situations, such as the conflict between political discussion and the fear of revolution, and yet it is possibly inadequate for other situations where some better characterization of the result of the balancing process may turn out to be available. We can at least be certain that no verbal formulation will succeed in protecting a class of publications which today arouses strong and widespread resentment. For example, if frank accounts of sexual matters would not be suppressed under the clear-and-present-danger test, so much the worse for the test. Those who favor a freer discussion of such topics can endeavor to lessen the resentment and substitute a different public attitude, but meanwhile they must take the world as they find it. So far as the current administration of the law goes, it is hopeless to seek a remedy by asking the courts to set up a test which is plainly unworkable. Instead, we must find a way of describing the balancing process which will appeal to the existing enforcement officials. We can look for a test or tests which will work.

If in this spirit we re-examine the clear-and-present-danger test, we can begin with its obvious division into two parts: (1) a substantial evil (2) near in time. The first part is commonly accepted as satisfactory. The criticisms of the test which are worth hearing are directed at the second requirement of immediacy. Should we then abandon the second part entirely in the perplexing situations which have not yet been covered by the Supreme Court, as is intimated by Howe and other thoughtful critics?<sup>21</sup> If we merely consider the relative

<sup>21</sup> See above, nn. 20 and 27.

## RESTRICTIONS IN GENERAL

seriousness of the evils at which the law is aimed, this will be an easy explanation of most of the obscenity and criminal cases. (A few suppressions will seem absurd, even on this theory.) The trouble is that this truncated test will justify too much. Witchcraft, for example, is a serious evil, so it is all right to suppress potential witches before they get in their dirty work. Kipling's *Without Benefit of Clergy* might conceivably lead to the establishment of many illicit homes by showing how to be happy though unmarried. We are back again to the "bad tendency" test which was so deleterious in the eighteenth century. We need more than a "substantial evil" test in order to protect much of the discussion and literature which we want to preserve.

Therefore, instead of dropping the second part of the Holmes test, let us try to rephrase it in a broader form which will include a wider range of situations and be capable of influencing the administration of law today. The essential features of his test are (1) a substantial evil (2) closely connected with the utterance in question. As Holmes stated the test, it demands a close *chronological* connection—"present." We have seen that this nearness in time is not altogether a satisfactory requirement in the control of obscenity. It seems sensible for us to retain the element of close connection by recognizing it as *causal* rather than chronological for obscenity and some other situations. The test thus becomes "clear and probable danger." Then we could argue to a censor who wanted to ban a really good novel or play which, like *Measure for Measure* and the Book of Genesis, contains a few disturbing thoughts or words: "Very likely, as you say, it would be very damaging to society if these passages were translated into illegal acts by many persons, but is it really likely that this will happen? Isn't the risk small enough to be worth run-

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ning for the sake of giving the public the benefit of all the good material that the author has put into his work."

The conclusions of the Commission on this problem of the legal boundaries of freedom of the press may be described as follows:

There should be opportunity for our society to make clear where it wants to go and define the ways to get there. This ideal does not require a total absence of all governmental control over the instruments of mass communication. Indeed, a minimum of control may be necessary to preserve public order, without which discussion could hardly go on. Probably it would be difficult for the members of our Commission, or of any other group of citizens, to reach unanimity as to the precise point at which suppression becomes permissible for any particular type of utterance. Yet, however they might diverge on details of application, the members of the Commission concurred in stressing certain aims as having the highest importance and in the belief that these aims should be limited, if at all, with great caution. As one member put it: "In a free society the presumption must always be in favor of freedom of utterance and expression at least from governmental controls, with the burden of proof resting in every case on those who assert the advisability of such control." The Commission agreed on these essentials: (a) the importance of the attainment and spread of truth, the maintenance of human dignity, and other aims fostered by open discussion; (b) the necessity of certain minimal limitations; (c) the solution of a free-speech problem by balancing these opposing considerations. Of course, the formulation lacks the exactness of a mathematical equation, as is inevitable. In particular, it leaves open the question of the nature and size of the "certain minimal limitations"; these will be surveyed in detail in succeeding pages of

## RESTRICTIONS IN GENERAL

this book. A broad answer by the Commission to that question was: "The degree of freedom from restriction enjoyed by any institution in a free society will depend, first, on the degree to which the institution serves the purpose of the society and, secondly, on the difficulties of restricting the institution without doing more harm than good to the purposes of the society."

### CLASSIFICATION OF GOVERNMENTAL RESTRICTIONS

There are several different ways of classifying governmental restrictions, none of which is clearly the best. It will be convenient, though not entirely logical, to use a single scheme as the framework for the intensive examination of the problems. For this purpose, I shall adopt the scheme which grows naturally out of the foregoing discussion of the clear-and-present-danger test and make my divisions of the material correspond to the specific evils which the government seeks to prevent whenever control of the press is contemplated. A four-fold division will best bring out the different policies involved. Therefore, the bulk of Part I will examine in detail four classes of minimal restrictions against four sorts of evils apprehended from the press. The four aims, each calling for a group of chapters, may be briefly described thus:

- A. Protection of individuals against falsehood.
- B. Protection of common standards of the community.
- C. Security against internal violence and disorder.
- D. Security against external aggression.

Yet, because this principal undertaking has to be long, I shall postpone it for a few pages and devote the next chapter to grouping restrictions according to two other schemes which are also significant.

# 3

## HOW RESTRICTIONS WORK

**T**HIS chapter will start with a rapid survey of the various methods which a government can conceivably employ to restrain the press, such as prosecutions, censorship, etc. Next, I shall briefly review the different organs for determining whether a particular matter is or is not objectionable—a jury, a judge, and so on—and emphasize other noteworthy aspects of the operation of the machinery of control. Without needing to be technical, I want to show how, in any free-speech problem, procedure is just as important as the abstract formulation of rights. This review will make it easier for the reader to understand some of the concrete situations which will be presented later, like the operation of libel laws and exclusion from the mails.

### METHODS OF CONTROL OR SUPPRESSION

*The requirement that books or other publications be licensed in advance.*—This was the method of control employed by the Crown in England, and later by Parliament, against which Milton protested in his *Areopagitica*. It is obsolete as to books and newspapers, but something of the sort exists for motion pictures in censorship states. Licensing also survives for the radio, where it appears inevitable at the present stage; here the primary purpose is not suppression but keeping the channels open, so it will be considered in chapter 20 in Volume II when we examine "Affirmative Governmental Activities."

## HOW RESTRICTIONS WORK

Conceivably, publishers of newspapers might be licensed and thus kept in leash. This is remotely possible through the business end of newspapers, but nothing of the sort has yet been attempted in this country. Also reporters might be licensed, as in Germany. Facsimile newspapers will raise a serious problem, since they involve radio.

*Censorship of offending material before publication or while publication is under way.*—After the censor objects to a particular passage, the publisher usually removes it or blacks it out; his failure to do so results in imprisonment and other punishments. This method has been much employed on newspapers by European governments. In the United States it cannot be validly used in peace, but it falls within the powers of a wartime censor (chap. 17). Censorship by the Post Office will be taken up in chapter 13. State censorship of motion pictures may involve excision as well as licensing (chap. 11).

*Seizure of offending material.*—This is used by the Customs Service, and to some extent by the Post Office. Obscene books or magazines are sometimes confiscated by the police.

*Injunctions against the publication of a newspaper or book or of specified matter therein.*—Disobedience is punished by imprisonment or a fine. This limited type of censorship of newspapers cannot constitutionally be employed as the suit of a public official.<sup>1</sup> The law as to private injunctions against libels will be discussed in chapter 4.

*Surety bonds against libels or other offending publications.*—This is another form of previous restraint used against newspapers in Tory England and considered improper in the United States.

*Compulsory disclosure of ownership and authorship.*—This has deterrent effects; but, since it has been advocated as a

<sup>1</sup> *Near v. Minnesota*, 263 United States Reports 697 (1921). See FSUS, pp. 375-61.

## HOW RESTRICTIONS WORK

means of keeping the channels of communication open, it will be discussed in that connection in chapter 20 in Volume II.

*Postpublication criminal penalties for objectionable matter.*—This is the most frequent form of governmental contact with communications. It is used against all four types of objectionable utterances. Usually a jury trial is required, but in contempt proceedings the judge sometimes acts alone. The significance of the jury will be considered when we examine procedure in the last portion of this chapter.

*Postpublication collection of damages in a civil action.*—This is the usual method of protecting individual interests, as in libel actions. A jury trial is required unless waived by the parties.

*Postpublication correction of libels and other misstatements.*—Rectification of an error in the press is a more straightforward remedy than the collection of damages. Various devices have been used to accomplish this purpose. For instance, France and Germany (before the Nazis) had laws compelling the newspaper to insert a reply at the request of the victim. The feasibility of such a remedy in this country deserves careful consideration (see chap. 6).

*Discrimination in access to news sources and facilities.*—Such practices have not existed in the United States, but their use by some European governments hinders American correspondents in collecting news. For example, it is important that a correspondent whose attitude is disliked by a foreign government should not find himself having to pay a higher price for the use of communications systems. The possibility that our own government can furnish help to our press in securing the desired free access abroad will be discussed under "Affirmative Governmental Activities" (chap. 19).

*Special prohibitions and restrictions on the foreign-language*

## HOW RESTRICTIONS WORK

*press.*—During the first war with Germany, foreign-language newspapers had to be submitted for governmental approval. No similar regulation is in force in time of peace.

*Discrimination and denial in the use of communications facilities for distribution.*—Thus far we have listed various kinds of governmental interference with the gathering and publication of news. Yet it is useless to be free to publish if the printed material cannot get out to readers. Distribution is carried on by different methods, each of which is more or less subject to interruption if the government so desires.

1. *The mails.*—Here the government directly controls the means of distribution. The powers of the Post Office over the content of publications will be reviewed in chapter 13.

2. *Express and other channels of interstate commerce.*—This is regulated by a federal criminal statute.<sup>2</sup> The Attorney General used this statute, along with the postal power, to suppress Father Coughlin's *Social Justice*.

3. *Newstands and other local commercial distributors.*—These might be controlled through licensing. Also the police may be slow to protect the distributors of disliked periodicals from the violence of private persons.

4. *Distribution on the street or from house to house, often without charge.*—Licenses have in the past been required by statute or city ordinance in the interest of the cleanliness of streets or the safety of householders; then licenses were refused for unpopular causes. The Supreme Court has greatly limited the validity of such regulations under the police power, in a long series of decisions relating to Jehovah's Witnesses.<sup>3</sup>

*Interference with importation.*—In view of the international

<sup>2</sup> 18 United States Code, sec. 896.

<sup>3</sup> Some of these are reviewed in FSUS, pp. 398-400.



## HOW RESTRICTIONS WORK

nature of ideas, importation is an essential kind of distribution. Restraints imposed by the Customs will be examined in chapter 12.

*Copyright protection, or the denial thereof.*—There are two quite different ways in which copyright laws affect the press. On the one hand, the normal operation of these laws restrains publication by plagiarists and pirates. This is usually considered to be right and proper. The reading public is deprived of cheap editions, but it gains in the long run from the encouragement of authors and publishers. On the other hand, when the courts deny copyright protection to particular books because of their supposed immorality,<sup>4</sup> the consequent loss of profit discourages the author from distributing his book. His liberty of the press can be regarded as restrained, although pirates are now left free to sell what they can on the black market.

Since the primary purpose of copyright is to encourage the flow of literature, it will be convenient to discuss its various aspects in chapter 20 under "Affirmative Governmental Activities."

*Taxes.*—In England during the French Revolution and the Napoleonic Wars, a heavy stamp tax on newspapers was a favorite method used by the Tory government to discourage popular cheap journals like Cobbett's *Political Register*, commonly called *Twoopenny Trash*. Huey Long imposed special taxes on newspapers above 20,000 circulation, which was high enough to exempt all the papers favoring Long and collect revenue from opposing journals. These taxes on knowledge were invalidated by the Supreme Court in the *Grosjean* case.<sup>5</sup> The Court ignored the possible ground of unfair discrimina-

<sup>4</sup> Rogers, "Copyright and Morals," 18 Michigan Law Review 390 (1900).

<sup>5</sup> *Grosjean v. American Press Co.*, 297 United States Reports 233 (1936). See FSUS, pp. 381-84, and below, chap. 21.

## HOW RESTRICTIONS WORK

tion in favor of smaller newspapers and based its decision squarely on liberty of the press.

Of course, newspapers, like any other business, are subject to the ordinary forms of taxation for the support of the government. This point and the possible governmental use of taxes and subsidies (the next method), not to discourage opponents, but for the purpose of breaking up large communications enterprises or improving them, can best be examined in Part II (chaps. 21 and 24).

*Discriminatory subsidies.*—The party in power might line up newspapers or broadcasting stations by granting outright payments of money to those who supported the good cause, leaving the others out in the cold. The same result can be more subtly accomplished by placing government advertising, etc. Closely related is the problem of the second-class mail privilege, which will be considered when the Post Office is taken up in chapter 13.

*Interference with buying, reading, or listening.*—Freedom to publish and to distribute is worth little unless there is somebody at the other end to receive. Communication is a two-way process. The government can scare the reader as well as the writer, the radio owner as well as the radio station. This kind of restraint was made familiar by the Nazis, but governments have long known how to punish the possessors of objectionable books. Fortunately, such practices have been little used in this country. During the "Red raids" after the last war, the presence of certain Russian "literature" was often cited as a justification of the invasion of houses and offices. And see the search-warrant clause in the Alien Registration Act of 1940 which opens the way to extensive seizures of books, etc., from their possessors.\*

\* See FSUS, pp. 425-26.

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Finally, it is important with most of these governmental penalties to remember that their consequences go beyond the penalty itself. Mill wrote: "The chief mischief of the legal penalties is that they strengthen the social stigma; it is that stigma which is really effective."

### PROCEDURE IN RESTRAINT AND SUPPRESSION

The most important stage in most of the government suppressive activities just described is the determination of guilt or innocence. The law draws a line of permissible utterances, beyond which a penalty or other burden is imposed. Hence it must always be decided whether the accused person or enterprise falls outside this line. Inasmuch as the line is sometimes blurred, the legal machinery for fixing its precise location in a particular case may be more significant than the general verbal definition of the line. For example, any statutory or judicial formulation of the test of obscenity counts for little; but a great deal depends on the temperament and training of the persons who decide whether publications are obscene. There is no escape from the constant search for "proper mechanisms." The largest difficulties connected with freedom of the press are not over broad definitions but over mechanisms capable of giving the result desired.

At least three features of this legal machinery deserve attention here: (1) Who draws the line? (2) When is the line drawn? (3) Is the machinery set up by the law on paper superseded in actual practice by extra-legal machinery which accomplishes the suppression?

*Who draws the line?*—If one runs through the numerous governmental penalties and burdens listed, he will readily see that the persons who determine liability differ greatly. (a) Since jury trial is constitutionally required wherever it pre-

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viously existed, unless it is waived by the parties, a jury guided by a judge usually imposes postpublication damages and punishments (except sometimes for contempt). (b) A judge without a jury issues injunctions, sometimes punishes contempt, and has appellate power over customs officials to determine the obscenity of imported books. (c) An administrative official or board, selected for reasons disconnected with ability to discriminate between good and bad utterances, can exclude matter from the mails, regulate the labor affairs of a newspaper, cut down its paper supply, etc. (d) On the other hand, expertness in the desirability of utterances is the basis for the choice of an official or board who can censor motion pictures in some states, censor newspapers in wartime, etc.

It is plain that the precise nature of the work to be done has much bearing on the question of the best person or persons to draw the line. For instance, in trials for sedition or libel there is a very strong tradition that the jury should settle all the important issues, yet it would be clearly undesirable for juries to do the work performed during the war by Byron Price as Director of Censorship. Consequently, when a particular kind of evil like obscenity or a particular governmental agency like the Post Office is examined, it is desirable to consider what deciding personnel is appropriate for the subject matter.

*When is the line drawn?*—If the list of governmental modes of suppression in the first portion of this chapter be reviewed, it will be seen that some kinds come *after* the matter has been communicated to the public. A writer may be sent to prison or forced to pay damages for what he has published, but the public has had the benefit of reading what he had to say. Inasmuch as part of his story may be true, this benefit may

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be considerable despite the falsity of some statements. On the other hand, a good many types of suppression (e.g., licensing of books or newspapers, censorship by deletion, and the powers of a wartime censor) operate *before* publication and thus keep the public from learning what was written. In other situations, such as the Postmaster General's denial of low postal rates to *Esquire*, the matter has been published but is still in process of circulation, so that some members of the public, at least, are deprived of the material. Hence we can regard postal censorship or seizure at the customs as forms of previous restraint.

This chronological distinction between previous restraint and a postpublication penalty is deeply ingrained in Anglo-American thinking about freedom of speech. The royal and parliamentary censors of the seventeenth century, whom Milton denounced in the *Areopagitica*, obviously used previous restraint. When this censorship expired in 1695 in England and shortly afterward in this country, men felt that liberty of the press had at last been established. At the same time, the postpublication libel action was familiar, and nobody expected it to disappear. Hence a definition of freedom of the press had to be framed which would prevent censorship and permit libel actions. Might it not be enough to outlaw previous restraints?

Such a simple solution became unsatisfactory during the eighteenth century. The government, denied the use of censorship, tried to control objectionable publications like the *Letters of Junius* and Wilkes's *North Briton* by postpublication prosecutions for seditious libel. Convictions were followed by severe sentences, and convictions were made easy by the doctrine of the judges that they and not juries should decide the big issue whether the publication was seditious. The jury was

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merely allowed to decide whether the accused wrote or published the matter in question. Naturally, the liberals of the day bitterly opposed this theory and wanted the jury to pass on all material issues. The famous *Zenger* case in New York turned on this controversy. From their viewpoint, freedom of the press involved both absence of previous restraint and the right to a jury trial. They repudiated the view of the judges and other conservatives, as summed up by Blackstone: "The liberty of the press . . . consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published."

The struggle over jury trial was eventually won by the liberals, who embodied their position in Fox's Libel Act and in the jury-trial clauses of American statutes and state constitutions. Still, Blackstone's definition of liberty of the press had considerable influence in this country. Many state constitutions follow the New York clause framed by Alexander Hamilton: "Every citizen may freely speak, write, and publish his sentiments, on all subjects, *being responsible for the abuse of that right.*"<sup>1</sup>

The upshot of this historical discussion is that previous restraints are especially under the ban. It is true that freedom of speech requires considerable limitation of postpublication penalties; not only is jury trial important, but also the crime which the jury is allowed to punish must be carefully restricted (e.g., by the clear-and-present-danger test). Still, whatever the quarrels of our time over criminal trials, the word "censorship" excites a general attitude of opprobrium. Any previous restraint has a hard time getting by. Injunctions against private libels are refused by the courts for the sake of freedom of speech. The Minnesota gag law on scandalous

<sup>1</sup> My italics.

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newspapers was upset by the Supreme Court in *Near v. Minnesota*,<sup>3</sup> where Chief Justice Hughes said:

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.

Despite this deep-seated hostility to previous restraints, some types are in force. The wartime activities of the Director of Censorship would surely be considered constitutional. The Supreme Court has upheld state motion picture censorship laws and postal censorship. And, of course, there is a great deal of private censorship, by the Hays-Johnston Office for motion pictures and by broadcasting stations over radio addresses.

The sad fact is that many businessmen in the communications industry like censorship. Previous restraint may be bad for the public, but it is good for them. Instead of doing something on the border line and going to prison afterward when a jury decides it was wrong, these businessmen prefer to be told ahead exactly what they can or cannot do. Therefore, the whole hatred of censorship appears to be weakening. In various concrete situations the businesses concerned are acquiescing in a systematic weeding-out before the material is offered to the eyes and ears of the public. Whether this previous restraint be performed by a government censor or by a representative of the industry, the loss to open discussion is much the same.

<sup>3</sup> 283 United States Reports 697 (1931). See FSUS, pp. 379-80.

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No treatment of the possible invalidity of previous restraints in general seems necessary, but something will be said on the subject in connection with the Post Office and other specific topics.

*Is the legal machinery the real machinery?*—Law in action is not always the same as law in books. It sometimes happens that a statute sets up a certain kind of machinery to determine whether a medium of communication is committing unlawful acts or not, and yet this machinery exists only on paper. Circumstances work out in such a way that the actual determination of the objectionable character of utterances is made in a very different way from what the statute contemplates. Take a striking example outside the scope of this book. The statute-book in most states imposes a criminal penalty for participation in an unlawful meeting and for anything which is spoken at a meeting in violation of law, but it gives no authority to any official to determine in advance whether a meeting held on private property can be forbidden as objectionable. This is the paper situation. In actual practice, the mayor of a city will often prevent any meetings open to the public in private halls within his city if he is opposed to discussion of the subject for which the meeting was arranged. Although he has no legal power to do this, he is charged with the enforcement of the building laws. These are often so complicated that almost any owner of a hall is afraid that he has violated them. Consequently, if it is announced that a meeting which the mayor dislikes is to be held in a particular hall, the mayor merely needs to hint that there may be something wrong with the width of the staircase or the number of exits or the size of the fire escapes. A word to the wise is sufficient, and the hall owner refuses to let the meeting be held on his



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premises.<sup>9</sup> Similarly, although a mayor is not authorized to censor particular plays at a theater in advance, he can eliminate anything he wishes from a play by suggesting that the annual license of the theater will otherwise not be renewed.<sup>10</sup>

This odd distortion of the machinery of enforcement is connected with the fondness of businessmen for censorship, which was mentioned in a previous paragraph. When the legal machinery involves a determination of unlawfulness by a jury in a criminal prosecution, the owner of the hall or theater or other business will usually seek to avoid such a prosecution by ascertaining in advance what is objectionable and abstaining from it. This is particularly likely to happen when the penalty following conviction is large in comparison with the probable profits to be derived from persistence in the borderline action. John Wilkes or Junius could afford to defy the government and risk an occasional term in prison for the sake of the large sales of their questionable output. On the other hand, the owner of a hall or a theater has everything to lose by permitting a banned meeting or a few censored lines in a play; but his annual income will stay practically as large if he bows to the arbitrary will of the mayor.

A striking example in mass communications industries of this gulf between law on paper and law in action is the distribution of books through booksellers in certain cities, particularly Boston.<sup>11</sup>

<sup>9</sup> See FSUS, pp. 525-27. For illustrations in Boston see Chace, *The Inquiring Mind* (1928), pp. 142-50.

<sup>10</sup> See FSUS, pp. 529-36.

<sup>11</sup> See below, chap. 10.

## *DIVISION A*

### *PROTECTION OF INDIVIDUAL INTERESTS AGAINST UNTRUTHFUL AND UN- JUSTIFIABLE PUBLICATIONS*

**N**ow begins a detailed examination of the extent to which government should give protection against four types of evils apprehended from mass communications.

In the first group I shall consider the following kinds of harm: (a) libel and (b) criminal libel (in chap. 4); (c) group libel (chap. 5); (d) other injuries to individuals from publications (chap. 6); and (e) inaccuracies generally (chap. 7). Since all the foregoing wrongs may conceivably be remedied or mitigated by the adoption of more efficient legal machinery for the compulsory correction of errors, a final chapter (8) will be devoted to the feasibility of this reform.

Although the protection of individuals from the press is emphasized by my title as a common factor in the group of wrongs now under discussion, solicitude for the victims of falsehood and vilification is not the sole motive which inclines the government to discourage the publications in question. In libel, for example, we can see that, in addition to the obvious injury to the defamed man, the community may also be harmed. First, an insult may provoke blows and even lead to a free fight. Keeping the peace was the chief reason for establishing courts, and the possibility of collecting substantial damages in a libel suit is a good safety valve. Hence libel actions are somewhat related to my third subdivision—security

## PROTECTION OF TRUTH

against internal violence and disorder. Secondly, libel law promotes the need of the community to have accurate information communicated to citizens. When we turn from damage actions to prosecutions for criminal libel and possibly for group libel, individuals drop into the background, while the concerns of society in peace and truth loom larger. Suppose the individual interests disappear. Should the law enforce accuracy for its own sake? Or is there some sound reason for the existing immunity of false statements which do not directly harm specific persons? This important problem will be considered later in connection with inaccuracies generally.

## LIBEL

## THE EXISTING LAW OF CIVIL LIBEL

**L**IBEL law happens to be the portion of the law which impinges most plainly upon the daily conduct of a newspaper. It may be roughly defined as the publication of defamatory matter in permanent form, usually in print or writing. The victim brings a civil action for damages against the newspaper. In such an action the most difficult question is often whether the reference to the plaintiff is libelous. A statement is libelous when it tends to bring the plaintiff into hatred, ridicule, or contempt. Or, to put the matter more precisely, anything in a newspaper is libelous if it is defamatory, and the word "defamatory" has been carefully defined as follows: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."<sup>1</sup>

*Libel and slander distinguished.*—Libel is the principal branch of the law of defamation. The other branch is slander. Whereas in libel the derogatory statements are printed or

<sup>1</sup> 3 Restatement of Torts, sec. 550. This book, published by the American Law Institute in 1933, contains a convenient summary of the law of libel and slander at secs. 553-623. This book is part of the *Restatement of the Law*, a co-operative enterprise of judges, lawyers, and law teachers. Although it lacks the authoritative quality of legislation and judicial decisions, its definitions and commentaries have considerable influence on the bench and bar.

## **LIBEL**

otherwise permanent, in slander they take a transitory form and usually consist of spoken words or insulting gestures. The responsibility for slander is more limited than for libel. Ordinarily libel is actionable if the communication is defamatory—tends to harm the plaintiff, even if he cannot show that it has actually done so as yet. In an action of slander, on the other hand, the plaintiff must prove actual harm to him (e.g., the loss of a job), unless the communication is of a particularly damaging character such as a charge of crime or of conduct and qualities incompatible with the proper exercise of his business or profession. For example, it is not safe to say in conversation that a milk-dealer waters his milk; but you can accuse him of cheating at golf with impunity so long as you do not cause him some specific loss like his expulsion from the club or making his fiancée scornfully break off the engagement. Yet if you write in a letter that he cheats at golf, you may have to pay him substantial damages although nothing happens thereafter.

As compared with libel, slander has little importance for mass communications. Consider the various industries. Newspapers, periodicals, and books furnish the chief share of libel actions. But writing or print is not essential, so long as the injury takes a permanent form. A cartoon or even a photograph may be libelous. A motion picture falls within the same principle. A dozen years ago, a character in *Rasputin* called Princess Natasha, who was ravished by Rasputin in the film, was thought to resemble the exiled Princess Youssoupoff, who had never been ravished. Although one has difficulty in seeing why the innocent victim of such a vile crime was defamed, especially after twenty years, the Princess recovered 25,000 pounds damages in one action, and Metro-Goldwyn-Mayer is said to have paid 150,000 pounds to settle all the actions, be-

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cause exhibition of the film in theaters all over the world opened endless opportunities for litigation.<sup>1</sup>

Radio broadcasting causes perplexities. Logically it is slander, for the defamatory matter is spoken and transitory, but practically the circulation to hundreds of thousands of listeners causes far more harm than the appearance of the same statement in any newspaper outside metropolitan areas. Consequently, most courts have held radio defamation to be libel, regardless of any proof of damage suffered. This, as we shall see, is very disturbing to the owners of broadcasting stations.<sup>2</sup> A fortiori a phonograph record, whether used in broadcasting or otherwise, would be libelous despite its use of the voice, because it is in permanent form.

*Every active participant in the publication of a libel is usually responsible in damages, regardless of fault.*—This rule makes libel actions terrifying to owners of mass media. In a newspaper, for example, not merely the reporter or editor who writes out a defamatory statement is liable, but also the publisher and perhaps even distributors and news vendors. Book publishers and the producers of plays and motion pictures are bound at their peril to eliminate anything libelous. Some courts have extended this doctrine to the radio and have held the station owner liable for whatever the sponsor or comedian or commentator or political orator chooses to say over the air. The owner of a station, and a fortiori of a network, is plainly in a much worse position than the newspaper publisher, who can, if he chooses, read over every column before the paper

<sup>1</sup> *Yousoupeff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 80 Times Law Reports 551 (1934).

<sup>2</sup> Among the numerous discussions of this problem listed in the *Index to Legal Periodicals* may be cited McDonald and Grimshaw, "Radio Defamation," 9 *Air Law Review* 323 (1933); Vold, "Defamatory Interpolations in Radio Broadcasts," 33 *University of Pennsylvania Law Review* 249 (1940); Note, 30 *Michigan Law Review* 1002 (1941).

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goes to press. Doubtless the radio owner can protect himself somewhat by insisting on a script, but what if the speaker interpolates or ad libs? Must the owner maintain a monitor to shut off the power the instant he detects defamation starting? Because of this hardship, some state courts have given a defense to the radio owner who exercised due care to prevent defamation and have left the victim to get what he can from the speaker. Not all state courts have let the owner off. Since broadcasts go into several states, the owner cannot feel safe under his own state law. It has been suggested that Congress should clear up the matter by federal legislation.<sup>4</sup>

*The good faith of the utterer of a libel is not in itself any defense.*—It is not enough that the writer of a libel has tried to check every fact and believes his statement to be true. Nor can he excuse himself just because he is repeating what was told him by somebody else or published in another newspaper. Good faith may, however, be material in connection with the recognized defenses now to be listed, besides reducing the amount of damages awarded when there is no defense.

### THE FOUR RECOGNIZED DEFENSES TO LIBEL ACTIONS WHICH ARE SIGNIFICANT FOR MASS MEDIA

1. *Truth.*—At common law the truth of a defamatory statement is a complete defense. In many states, however, statutes or constitutions provide that truth is a defense unless the matter was published "from malicious motives," etc. Since the jury is to judge of the motives, this exception is alarming to newspaper owners. Its purpose was reasonable: to deter people from raking up old scandals against men who had long led blameless lives. Even when truth is a complete defense on the face of the law, it may not be worth much practically. The

<sup>4</sup>See references cited in the preceding footnote. The Restatement of Torts, sec. 577, refuses to express any opinion on this question.

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burden of proving truth is on the defendant, and it is often difficult to establish the correctness of every item of his defamatory statement. Furthermore, if he does not succeed in convincing the jury, the very fact that he has pleaded truth in the lawsuit is considered in many states as an aggravation of the injury to the plaintiff's reputation, a sort of repetition of the original libel; and the jury can increase the award of damages accordingly.<sup>5</sup>

2. *A fair and accurate report of a public proceeding.*—This defense is very important for the news columns of journals. So long as they give either a complete report or a fair abridgment of the trial of a case, a legislative debate, or a governor's message, they can usually feel safe no matter how much individuals have been defamed by what was said in the proceedings thus recounted. It seems probable that the same defense extends to newsreels and news broadcasts. In a murder trial the judge allowed a microphone to be set up in the courtroom, so that very damaging testimony about a particular witness went into a thousand homes. The broadcasting station was held not liable.<sup>6</sup>

Here, however, is one of the points where the defendant's good faith does become material. The report must not be made solely for the purpose of causing harm to the person defamed. This again is a jury question, but a newspaper is not likely to be found thus at fault so long as it fairly reports the public proceeding.

"It is not necessary that [the report] be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it convey

<sup>5</sup> Restatement of Torts, sec. 881, Comment c.

<sup>6</sup> *Irwin v. Ashurst*, 128 Oregon Reports 61 (1938).



to the persons who read it a substantially correct account of the proceedings. <sup>1</sup>

"Not only must the report be accurate but it must be fair. Even a report which is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, while it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it, as for example a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence, or the use of a defamatory headline in a newspaper report, qualification of which is found only in the text of the article. The reporter must make no addition or comment of his own nor impute corrupt motives to any one nor indict expressly or by innuendo the veracity or integrity of any of the parties."<sup>2</sup> If the reporter does add anything of his own, he may perhaps have a different defense—fair comment<sup>3</sup>—but he is not protected by the defense now under discussion.

The considerations just outlined contribute to the uninformative nature of press reports of trials. The journal hardly dares to go beyond a bare recital. It fears to explain the bearing of testimony or relate today's witnesses to those of yesterday, because it might thus forfeit the defense of a fair report and be charged with intention to injure some individual concerned in the trial. Additions might not be actionable, but the editor takes no chances. Hence the reader is left to do his own piecing-together.

3. *A statement of facts which affect an important interest of the recipient.*—The stock example of this defense is that the former employer of a cook is asked by a prospective employer

<sup>1</sup> Restatement of Torts, sec. 611, Comment d.

<sup>2</sup> See below, pp. 82-83.

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about the cook's qualifications and replies that the cook left with some solid-silver spoons. Even though the cook did not steal the spoons, the housewife is not liable so long as she honestly and reasonably believed what she said. If it were not for this defense, prospective employers would have a hard time in learning sad facts about those they proposed to engage, because a penalty for mistaken statements would deter possible informants from saying anything for fear they might be wrong, and even the complete truth might, for all they knew, be found by a subsequent jury to be a tissue of lies.

This defense is obviously of little use to newspapers except in one possible situation: statements to the voters about candidates for office. This will be discussed in connection with the next defense, because it is not settled where it properly belongs.

4. *Fair comment.*—This defense is very important for the book reviews and theatrical criticisms in periodicals. "Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory, (a) is upon a true . . . . statement of fact, . . . . and (b) represents the actual opinion of the critic, and (c) is not made solely for the purpose of causing harm to the other."<sup>9</sup>

The basis of this defense is that, when a person submits his work or himself to the public, it is desirable for the public to have help in forming its judgment upon what it is asked to take. A novelist or dramatist or actor is asking the public to pay money for what he offers, and he ought to take his chances of unfavorable criticism. Lord Ellenborough said:

Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. . . . The critic does a great service to the public, who writes

<sup>9</sup> Restatement of Torts, sec. 606(1).

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down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash.<sup>10</sup>

This defense has been analyzed as an application of the general principle of freedom of speech—the public interest in the spread of truth.<sup>11</sup>

It will be observed that this defense has considerable relationship to its predecessor. Just as the housewife has an interest in learning about the merits of a cook, so the public has an interest in learning about the merits of a play. In both defenses there is a qualification that the statement must be made for the sake of the recipient's interest and not in bad faith for the purpose of injuring the plaintiff. Nevertheless, there is one big difference between the two defenses. The scope of fair comment is much narrower. When the statement is made to serve the important interest of a single recipient, like the housewife, even errors of fact are protected. So long as nobody is told except a person directly concerned, honest misstatements of fact do not cause enough harm to offset the need for frankness. By contrast, a dramatic criticism must be right on its facts. The honest critic can say with impunity that the play is indecent, even if the jury thinks it highly moral; but he must not misquote the dialogue as the basis of his charge of indecency. He can mistakenly charge a missionary with being a stupid preacher but not with pocketing the gifts for the heathen. This narrow scope for the defense of fair comment seems just. A misstatement of fact here goes to a large number of people, many of whom have no strong interest in getting information about a play which they do not

<sup>10</sup> *Carr v. Hood*, 1 Campbell's Reports 355 note (England, 1806).

<sup>11</sup> Judge Veeder, "Freedom of Public Discussion," 28 Harvard Law Review 418 (1910).

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intend to see. Even in the cook's case, the prospective employer must not be told about the supposed theft in the presence of the whole ladies' bridge club. Furthermore, those who do need information about the merits of the play ought to receive a correct account of the facts on which the critic bases his unfavorable opinions. Finally, the law wishes to encourage dramatists as well as dramatic critics. Men would hesitate to come before the public if the consequence were that their acts could be falsified with impunity.

This defense of public concern embraces many different types of plaintiffs and extends far beyond the literary illustrations just employed. The conduct of charitable and educational institutions is a matter of public concern. The skill of a surgeon, the abilities of a lawyer, the inspiration of a painter, are all open for comments, so long as facts are not misstated. Rather oddly, no court yet appears to have held that the work of architects is similarly subject to criticism. Early in its career the *New Yorker* started a column about the merits of recent buildings and then discontinued it for fear of libel suits. I feel sure that an opinion that a new college building is a blot on the campus would be protected, regardless of its justice, though not, of course, an erroneous statement that the floors of the classrooms might give way at any moment.

Public officers and candidates for office are at least open to fair comment. Everybody will go this far.

"The public conduct of every public officer and candidate for office is always a matter of public concern in the community in which he holds or seeks office. The area of privileged comment is not confined to such community, however, if the public conduct of the officer is of more than local interest. If criticism of a public officer or candidate is a means of attacking a political system of which he is a part, or if the criticism

for any other reason affects a public policy of widespread interest, the area of comment may be extended as far as the interest is felt. Thus, the conduct of a judicial or executive officer who has participated in or failed to prevent a gross miscarriage of justice may be criticized outside the community in which he holds office.

"The concern which all citizens have in the proper conduct of public affairs by public officials requires that they have a wide freedom to discuss among themselves the public conduct of their officers and the qualifications of those who seek public office. Those who hold such offices and those who offer themselves as candidates therefor, by so doing subject their public acts to honest criticism even though it be extravagant and unjustified. To make the critic's protection depend not only upon the sincerity of his criticism but also upon its being such as a reasonable man might make would tend to prevent the public from knowing much essential criticism. The advantages gained by the freedom of discussion . . . are therefore sufficient to outweigh the danger that the reputation of public officers or candidates may suffer thereby.

"The privilege of comment . . . includes not only criticism of the manner in which executive officers exercise their discretion but also criticism of the manner in which they and their subordinates carry out their purely ministerial functions. So too, the privilege includes honest criticism of the votes, speeches and other public acts of legislative officers. It is immaterial whether the criticism is of the words or conduct of the legislator while on the floor of the legislature or elsewhere. It is enough that it is a criticism of an act of the legislator done in his official capacity as such."<sup>11</sup>

For example, a candidate for mayor is said by a newspaper

<sup>11</sup> Restatement of Torts, sec. 907, Comments b, c, d.

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to have become intoxicated and got into a street fight. The newspaper pronounces him unfit for office. Even if the jury considers this judgment unsound, the newspaper has a good defense so long as it was right about the drunkenness and the fight. Suppose, however, that the candidate proves that he was not really drunk but only acted that way when he was cold sober. Here is a misstatement of fact, for which the defense of fair comment is useless.

The preceding wider defense for statements made to protect a recipient's interest<sup>13</sup> would cover such an honest error of fact, if the newspaper be entitled to that defense and not merely to protection for fair comment on correctly presented facts. Should candidates for office be subject to more untrammelled discussion than authors and actors? A persuasive argument can be made to that effect. Just as the housewife has a strong interest in learning about a cook before she hires her, so the voters have a strong interest in learning about the candidate before they employ him as mayor. Just as the former employer is not liable when she mistakenly charges the cook with theft, because she has a moral duty to warn her friend, so it may be urged that a newspaper should be protected when it honestly seeks to enlighten the voters; that, as Chief Justice Burch of Kansas said,<sup>14</sup> the newspaper is fulfilling the "duty . . . to keep the public administration pure by warnings respecting the character and conduct of a candidate for office." Unless innocent mistakes are protected, newspapers will be afraid to tell the absolute truth for fear of not being able to prove it, and so the election will be held without the advantage of full information.

Yet this argument has won little acceptance outside

<sup>13</sup> See above, pp. 86-88.

<sup>14</sup> *Coleman v. MacLennan*, 78 Kansas Reports 711, 735 (1906).

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Kansas.<sup>14</sup> Judge Veeder gives a good reason for the prevailing rule that criticism of candidates for office should not have a wider defense than fair comment.

"However, logic is not necessarily law. The whole doctrine of immunity in defamation is based upon public policy, and the only valid objection to protecting statements of fact in relation to candidates for elective office rests upon such considerations. It is the conviction that such a doctrine would do the public service more harm than good. The danger that honorable and worthy men may be driven from politics and public service by allowing such latitude in attacks upon personal character outweighs any benefits that might accrue to the public. Such license would create a disinclination for public life on the part of honorable men by making them feel that it was incompatible with wholesome self-respect and decent reputation; it would drive men of sensibility away from its opportunities in sheer disgust, and leave public employment to callous and self-seeking adventurers. It seems plain that immunity in fair comment extends the utmost protection to free communication in matters of public interest that is compatible with a proper regard for personal rights."<sup>15</sup>

### **OTHER MAIN RULES OF LIBEL**

*The only remedy for libel recognized by the existing law is an action for damages triable by a jury.*—There is a very strong policy in American law that most of the material issues in a libel action should be determined by a jury. This tradition goes back to the eighteenth-century controversy over the respective functions of judge and jury in trials for seditious libel, where the Crown wished to limit the scope of the jury

<sup>14</sup> It is rejected by Restatement of Torts, sec. 607, Comment a.

<sup>15</sup> 28 Harvard Law Review at 419.

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in order to obtain easier convictions. English events in this controversy were eagerly followed by the colonists, who had become familiar with it in the famous *Zenger* case. Eventually the liberals established the wide powers they desired for the jury, by Fox's Libel Act in England (1792) and by state constitutions or statutes in this country. Although these enactments apply in terms only to prosecutions for writing and print, their emphasis on the jury is extended to civil actions brought by individuals. Consequently, the jury has a very large control over the actual administration of the libel rules already outlined. It is significant that in England, where jury trials in civil actions have been pretty much abandoned, they are still preserved for defamation suits. In short, the question whether the plaintiff's reputation in the sight of his neighbors has been injured is mainly referred to twelve of those neighbors for decision.

This predominance of the jury in libel actions accounts, as will be seen, for much of the apprehension with which the owners of the mass media view the possibility of such lawsuits.

The American rule refusing injunctions against the distribution of libelous matter rests in part on this strong jury-trial policy. The victim of most other wrongs can obtain an injunction against their commission or continuance whenever money damages would be an inadequate compensation for the harm. Many libels in newspapers and magazines are so serious that they threaten to reverberate through the community for a long time to come and cause harm which cannot be estimated in dollars and cents. Consequently, the general principle as to injunctions against irreparable injuries would naturally include such libels. The moment the offending statement appears on the streets, the victim would be glad to cut



its circulation short by a court order. Yet such an order will be denied in most states.<sup>17</sup>

In the leading American case, more than a century ago, Lance sought to revenge himself on his former employer Brandreth, the proprietor and vendor of "Brandreth's Vegetable Universal Pills," who had discharged Lance for improper conduct. So Lance advertised a book entitled "The Life, Exploits, Comical Adventures and Amorous Intrigues of Benjamin Brandling, M.D.V.P.L.V.S., a distinguished pill vender, written by himself; interspersed with racy descriptions of scenes of life in London and New York." A replica of the Table of Contents showed that the subject of this purported autobiography could expect the worst. While the book was in the press, Brandreth sought an injunction restraining publication and ordering the destruction of the manuscript and the book. The New York court dismissed the action without bothering to read the book or hear any evidence.<sup>18</sup> Twentieth-century courts take the same position. When the Marlin Fire Arms Company stopped advertising its repeating rifles in a magazine called *Recreation*, the owner of the magazine wrote and published in its columns several letters from imaginary correspondents which reflected on the Marlin rifles. An injunction was denied by Chief Justice Alton B. Parker, again without hearing any testimony.<sup>19</sup>

One reason for this denial of badly needed relief is the absence of a jury in suits for an injunction. If issues should arise at the trial as to the defamatory nature of the defendant's statements or their truth or the existence of other

<sup>17</sup> See Pound, *Cases on Equitable Relief against Defamation and Injuries to Personality* (2d ed. by Chafee [1930]).

<sup>18</sup> *Brandreth v. Lance*, 8 Paige's Reports 24 (New York, 1839).

<sup>19</sup> *Marlin Fire Arms Co. v. Shields*, 171 New York Reports 394 (1902).

defenses, those issues would be decided by a judge. The great tradition would be violated, that representatives of the community at large should participate in proceedings against printed matter. Sometimes this objection might be removed by a deferment of the injunction until a jury had first decided that the defendant was liable for what he said, although in most cases the resulting delay would put off the injunction until it was too late to do much good to the victim of the libel. Even this scant remedy finds very little support in American cases; a jury in equity is unusual, and the device fails to get around the second reason against libel injunctions.

This second reason is the constitutional right to freedom of the press. A damage action for libel comes after publication and does not necessarily kill the offending matter. The public still has a chance to read what is said. But an injunction would stop the periodical or book and deprive the public of this benefit. One may ask, "What is the value of letting people read false statements?" That is not quite the whole story. In the first place, the matter in question may not be wholly false. Along with the lies and distortions may go a good deal of truth, which the public ought to read and will never read if the publication be prohibited. An injunction cannot very well discriminate in such cases; it must root up the wheat with the tares. Obviously there was no truth at all in the Marlin rifle letters, and the total disappearance of Brandreth's life would do little harm, but usually an extensive publication like a book or an article in a newspaper or magazine is not just a tissue of lies. Visualize a politician getting the entire issue of a daily paper enjoined because a judge found two or three misstatements in an article which for the most part disclosed actual rottenness in the city government. Furthermore, we cannot safely assume that the statements are really false. All we know

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is that the plaintiff and the judge call them false. If the judge could suppress the whole publication because of his opinion about a few items, he would be a sort of censor. One man's judgment is not to be trusted to determine what people can read. Even if a jury were brought in, we should still be letting a few men stop the reading of many men, and the jury might also go wrong in deciding that portions of the publication were false. So our law thinks it better to let the defamed plaintiff take his damages for what they are worth than to intrust a single judge (or even a jury) with the power to put a sharp check on the spread of possible truth.

The two cases already stated may well leave the impression that this idealistic devotion to free speech is voiced by pretty bad people and should be dismissed as arrant hypocrisy. It must be admitted that *Lance* and the owner of *Recreation* are shining examples of the drum-thumping, purchasable, public-cheating purveyors of doctored news and thimble-rigged opinions whom we hate to see creeping under the shelter of the Bill of Rights. Yet Judge Pound warns us:

Although the defendant may be the worst of men . . . the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected.<sup>20</sup>

Some understanding of the force in the reasons against libel injunctions which I have described is furnished by the facts of an English case, which also denied relief.<sup>21</sup> The plaintiff was a large insurance company with thousands of English policyholders. The defendant had lately published a pamphlet on life insurance companies, commenting on the financial situation of the plaintiff and several other companies.

<sup>20</sup> *People v. Gitlow*, 234 New York Reports 132 at 133 (1922).

<sup>21</sup> *Prudential Assurance Co. v. Knott*, Law Reports, 10 Chancery Appeals 142 (1875).

The plaintiff charged that the effect of portions of the pamphlet and of the erroneous statements in it was to represent the plaintiff as being managed with reckless extravagance and unable to fulfil its engagements; this, the plaintiff said, was wholly untrue. Was not the court right in refusing an injunction and letting the public take the pamphlet for what it was worth? We do not know whether any of the statements were false as charged, but perhaps some of them were true. If the court had undertaken to pronounce on such questions, it might have erred. Perhaps the plaintiff's business methods needed a good raking-over. No doubt, the circulation of lies about life insurance companies is dangerous, but the companies can reply, and the suppression of the true parts of an attack on life insurance companies is even more dangerous to a community. Their soundness is a matter of great public concern. Think how glad the big life insurance companies would have been forty years ago if they could have got some friendly judge to enjoin a printed revelation of the shenanigans in which they were then indulging, on the ground that the critic had made some false statements?

This case is no longer law in England, where the courts now issue libel injunctions with great caution. Distinguished authorities have urged a similar revision of the American rule against such injunctions.<sup>22</sup> Perhaps American judges can be better trusted now than in 1917-20 to administer restrictions on free speech with wisdom and moderation. Still, I am reluctant to put the power to suppress printed matter in the hands of either a censor or a judge.

At one point, however, the judicial reluctance to issue injunctions in libel suits has been pushed too far. Occasionally, a court has been asked to order the defendant to print a correc-

<sup>22</sup> See, e.g., 4 Restatement of Torts, sec. 942, Comment d (1950).

tion of a defamatory misstatement, and it has refused to do so, saying the rule against forbidding injunctions extends to affirmative injunctions as well. This topic will be considered at length later.<sup>23</sup> It is enough now to point out that the objections just considered need not apply to an order for correction if properly framed. It does not suppress the good with the bad, for it lets even the bad stand.

*The measure of damages in libel actions.*—Although the jury always awards a lump sum of money to the victorious plaintiff in a libel action, the jury is customarily instructed by the judge that it may consider three kinds of damages as conceivably caused by the publication on which the suit is based.

1. *Special damages* give the victim compensation for an actual pecuniary loss resulting from the defamation, such as discharge from his job.<sup>24</sup> The amount requires elaborate proof, and an excessive award by the jury can readily be reduced by the trial judge or by an appellate court.

2. *General damages* cover the injury which the victim's reputation in the community has suffered. The value of his reputation before the libel and its value after it has been lowered by the libel are matters which can only be roughly estimated by the jury or anybody else. Hence the jury has a much wider scope here than when it assesses special damages, and a large verdict for the plaintiff will not be disturbed by judges unless it be plainly excessive.

3. *Punitive damages* are sometimes imposed if the jury regards the defendant as a bad actor. Suppose, for example, that a newspaper reports that a politician was arrested for snatching women's handbags, whereas the real prisoner is another man with the same surname. The jurymen are con-

<sup>23</sup> See below, chap. 8.

<sup>24</sup> Cf. the rule as to slander, above, pp. 77-79.

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vinced that the city editor knew very well that he was mixing up two different persons but hoped to ruin the politician's chances at the coming election. Consequently, after the jury has fixed special damages for the plaintiff's defeat at the election and general damages for his smirched reputation, it puts some more money on top of the pile so as to deter the newspaper from playing such a dirty trick a second time. This "smart money," as it is sometimes called, is a sort of criminal penalty in a civil tort action. It is not limited to defamers but is sometimes exacted from other evil-minded wrongdoers like destructive trespassers and deliberate misappropriators of automobiles. Punitive damages are not compensation. The politician in my supposed case has already been made square for the loss of his job and his good name. Yet, whenever the jury thinks that the defendant has behaved very badly, it is allowed to give the plaintiff a windfall in order to soak the defendant as he deserves. Here again the jury has a wide scope in fixing the amount of the damages, although extreme vindictiveness will be corrected by a court.

Some states forbid punitive damages (e.g., Massachusetts), and I am inclined to think that this is a desirable rule. Punishment should not be scrambled with compensation. The proper purpose of damage suits is to give back to plaintiffs what they have lost. It is better to leave criminal proceedings in the hands of the district attorney and not have private lawyers stirring up juries to collect fines, of which these same lawyers will receive a substantial share. Fines ought to be paid into the public treasury.

### GENERAL ESTIMATES OF THE MERITS AND EFFECTS OF THE EXISTING LAW OF LIBEL

Opinions on the merits of the existing law of libel are quite conflicting. As typical extremes, I shall present the views of

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two leading metropolitan lawyers. Each is experienced in a wide range of practice including numerous libel suits. One has frequently defended a large conservative daily. The other has been more of a free-lance lawyer in libel actions, representing many plaintiffs and defendants, although he prefers being for the plaintiff.

The defense attorney describes our libel law as a museum of antiquities—"confused, archaic, with no relation to modern life." He has seldom known a worthy libel suit. He remarks that counsel for plaintiff habitually quotes to the jury from Othello: "Who steals my purse steals trash, but he who filches from me my good name . . ." without realizing who spoke the lines. It was Iago, and, according to this lawyer: "Iago was a typical libel plaintiff." Therefore, this lawyer favored several reforms (to be reviewed later), which in his opinion would cut down excessive recoveries, facilitate legitimate defenses, and discourage baseless suits. The free-lance lawyer was a wholehearted optimist. He rejected every reform suggested. He thought that the law is better left as it is; its rules are well suited to our conditions; it is absolutely untrue that there has never been an honest libel suit; not one libel out of ten is the subject of litigation. He has frequently advised victims not to sue. And the defamed person is frequently satisfied if the newspaper merely prints a retraction. There is some public prejudice against libel plaintiffs, but, as in other trials, it disappears after the suit starts. Some actual recent cases described by him involved serious injuries to the reputations of the plaintiffs who had recovered large verdicts.

It seems possible that these divergent views as to the good faith of the men who bring libel suits can be explained by the different experiences of these two lawyers. The pessimist represents a newspaper which is free from sensationalism and

anxious to be decent and avoid mistakes. Year in and year out, it presumably prints very few errors which are harmful enough to individuals to justify bona fide claims for substantial damages. When errors are pointed out, it is probably quick to make corrections. The optimist, on the other hand, has been brought into contact with a number of journals of various types, some of them doubtless with a low sense of responsibility. If libel suits were discouraged as much as the pessimistic defense lawyer desires, then journals of this sort would become still more reckless.

As to the merits of the existing law, it depends on what one is talking about. The outline of the main rules of libel in the earlier part of this book does not look to me like a museum of antiquities. On the contrary, those rules seem intelligent attempts to adjust conflicts between the need for an unblemished reputation and the need for frank discussion of important topics. A few proposals for changes will receive attention subsequently, but so far as the formulation of main rules goes (aside from the rule allowing punitive damages which should probably be abolished in states where it survives), I think that there is a good deal of force in the optimist's view that the law had better be left as it is. Still, these main rules are not the whole of libel law. When one looks beyond their wording to the way they actually work in the courtroom, the strictures of the pessimist are not entirely undeserved. If you read the conglomeration of libel cases reviewed in a popular style by Morris Ernst and Alexander Lindey in *Hold Your Tongue!* (1932), you too may think the whole business is "confused, archaic, with no relation to modern life."

At least three causes of this confusion in the actual operation of libel law deserve mention:

1. *Subsidiary rules of law.*—Although the main rules, as al-



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ready outlined, seem reasonably satisfactory, the great range of printed matter embraced in libel law has brought about a number of minor rules which guide courts and juries in applying the general principles as to defenses, bad faith, and so forth, to certain specialized situations. A good many of the complaints about the law of libel are really directed at these subsidiary rules. They vary a good deal from state to state, so that a particular lawyer's estimate of libel law may depend considerably on the situation in the state where he practices.

Take two examples of subsidiary rules which newspapermen consider unfair:

In some states the defense for fair reports of judicial proceedings<sup>25</sup> does not include the pleadings of the parties in a civil suit, e.g., the plaintiff's statement of his cause of action (complaint), which he files considerably ahead of the trial in the courtroom. Hence newspapers run considerable risk in telling their readers what a pending lawsuit is about.

Again, there are states where the repetition of the same charges against the plaintiff in a newspaper on different days is evidence of bad faith, even though there be a sensible reason for the repetition. For example, a man is arrested on a charge of crime which the newspaper prints. Some weeks later, he is brought to trial, and the newspaper's account of the trial begins with the charge. He is acquitted and sues the newspaper for libel, proving that the charge of crime was untrue. Although each press story by itself is within the defense if fairly made, as it really was, the combination of two stories of the same nonexistent crime permits the jury to find the newspaper acted unfairly and is therefore libel. One can see how repeating the same court charge morning after morning for a fortnight, say, is giving the public unnecessary information, so that such

<sup>25</sup> This defense was explained above, pp. 81-82.

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persistent repetition is naturally explicable as a plot to injure the arrested man. However, in the case stated, the public needed to be told a second time.

In view of the conflict between the courts of different states as to subsidiary rules of this sort, such rules seem to raise local rather than nation-wide problems, so that I cannot say whether changes are desirable.

2. *The intangible nature of some of the chief issues in a libel action.*—This is a much more serious cause for the haphazard appearance of the outcomes of libel suits as compared with many other types of litigation.

First, consider the issue as to the amount of general damages for injury to the plaintiff's reputation. In any kind of lawsuit where the defendant is not clearly free from fault, the measure of damages becomes an important issue. At best, the task of determining what he ought to pay offers problems, but the jury can often be supplied with objective standards of measurement. Take a few examples outside libel actions. In breach of contract for a buyer's refusal to accept goods, damages are the contract price, which is definite, *minus* the value of the goods, which can frequently be ascertained with rough accuracy. In an automobile accident the injury to the plaintiff's car can be determined with the help of his repair bills; and, even if he sustains bodily harm, the jury can obtain a good deal of guidance from his medical bills and the testimony of doctors about the duration and extent of his incapacity. Furthermore, in either a contract or an accident case, the trial judge or the upper court has a fairly good check on the jury's estimate and can readily detect mistakes which warrant correction of the verdict through a new trial, etc. Now, contrast the difficulty of measuring the loss of a man's reputation because of a libel. The jury is told to decide what it was before

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the libel and how much it has been lowered by the false statement. There is no market price for such matters, and experts in reputation do not exist. Horse sense is about the only test available. The trial judge or the upper court may have a feeling that the jury has gone too high or too low, but how can a judge be sure of this when he himself has no standard to tell him what is the right sum to be paid? So, unless the verdict is plainly outrageous, it will probably be left alone. Naturally, then, an award in one case may be far out of line from the damages recovered in some other case.

Or look at the issue of bad faith, which a plaintiff can present for the purpose of undermining most of the important defenses already outlined. The plaintiff is surely harmed by the defendant's words. Were these published just to do harm? This is a much more delicate question than whether a motorist drove his car with reasonable skill. Emotions almost inevitably play a part in the answer which the jury gives, but a judge is unlikely to feel that he can say the jury's answer is wrong.

3. *The jury's predominance in libel suits.*—This factor is closely related to what has just been said. The intangible issues described must be intrusted to a jury because of a great historical tradition, and for the same reason judges are even more reluctant than in civil litigation generally to substitute their own judgment for that of the jury. Consequently, the various reasonable rules of law previously outlined tend to become fused into one simple human question, "Which is worse, the plaintiff or the defendant?" Both optimists and pessimists will probably coincide in agreeing with the last two sentences of the following statement:

"The best protection for the press [against libel cases] is first in having an alert staff so that defamatory articles will

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not be published, and second, the employment of competent counsel. . . . William Scott Stewart, a leading trial lawyer of the Chicago bar, [gave the] advice to lawyers not to take libel cases against newspapers. Ordinarily, this is pretty sound advice. For in a libel suit, on the plea of 'mitigation of damages,' the defense has an opportunity to parade before a jury hearsay statements of all kinds on the basis of which the author usually claims he came to his conclusions. My own experience is that the *result in a libel case depends upon whether or not the jury likes the plaintiff*. If they do, he gets a verdict, otherwise not."<sup>20</sup>

Aside from any possible unfairness to newspapers in the existing operation of libel law, which may increase the cost of running a paper, does this law have a deleterious effect upon the contents of newspapers? The Commission was much more concerned about this question than about the merits of any specific legal rule.

Timidity was the bad effect most stressed by our informants. Thus, according to an experienced editorial writer, the fear of possible libel suits tends to make a newspaper timid in dealing with anybody who is subject to criticism, in naming people, and in criticizing business dealings. This timidity promotes the use of circumventing language.

Yet libel law is only a partial cause for timidity, in his opinion. Talk about a libel suit is often used by newspapers as an excuse for cautious conduct which is really otherwise motivated. A significant proof of the existence of other reasons for timidity is the press handling of the activities of the Truman Committee, which reached unfavorable conclusions about some businesses engaged on war contracts. There was no

<sup>20</sup> A. G. Hays, book review, 58 Harvard Law Review 881 (1945). (My italics.)

danger from libel suits because of the protection given by the law to reports of public proceedings;<sup>17</sup> and yet the newspapers displayed the same old caution. In other words, the sympathy of the newspapers with the persons they refrain from criticizing may be an influential factor as well as libel law. Another and more praiseworthy cause for timidity is the honest desire to avoid harming people mistakenly. The time element is tremendously important in newspaper operations and constantly in the minds of newspapermen. Almost everything has to go to press soon after it is written, or it will be stale. The margin is usually too small for thorough investigation of the truth of damaging statements, so that errors are likely to occur, as the writers are well aware. Rather than hurt somebody wrongly, they incline to shade things down or say nothing. This honest desire not to put out hurtful errors would induce considerable caution among the better newspapermen even if there were no libel law and no business influences on the writing of news. Because of these various factors, "a chain of cautions" is often developed.

Still greater skepticism about libel law as a reason for the timidity of newspapers was expressed by the free-lance lawyer already quoted. When disadvantageous effects were suggested, especially in the treatment of local politics and business, he replied that the law did not make much difference in what a newspaper would say. By a change of phrasing and leaving out a specific name, the paper can say the same thing and protect itself from libel charges. It is hard for me to see how everything can be taken care of so neatly. For instance, a reporter's account of his own investigation of a municipal scandal can hardly be watered down like this. Unless the owner is prepared to prove the truth of every item in court,

<sup>17</sup> This defense is explained above, pp. 81-82.

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he may very well be deterred by fear of libel suits from using the article at all.

This lawyer also scouted the notion that the complexities of libel law require newspapermen to run to a lawyer before they can safely publish. In his opinion, it is easy to tell without legal advice whether or not a particular statement is libelous. Counsel is helpful only in judging whether a suit is likely and what will be the amount of damages.

Nevertheless, the actual operation of libel law in the courtroom affords some reason for caution on the part of newspapers. The defense of truth is difficult to prove. The chief value of setting up this defense is to enable the newspaper to get in material supporting its original statement so as to negate the charge of bad faith and thus persuade the jury to give low damages. The use of all this supporting material often turns the trial into a "free for all." Much will depend on the emotions of the jury, which will often be divided, but in many states a unanimous verdict is no longer necessary in damage suits. Ten jurors are enough. This being so, I think that there must be many times when a newspaper consults a lawyer whether it can safely publish a report on some local matter of considerable public importance, where the outcome of a free-for-all libel suit will be so uncertain that the lawyer cannot predict which way the verdict will go, or put any moderate top limit on the damages ten jurymen may impose. In such a situation the newspaper may naturally suppress its report unless it be zealous for reform, and the public will suffer for want of enlightenment.

However, the managing editor of a metropolitan newspaper said that he had no great difficulty under New York law. It works well although it looks bad on paper. No newspaper editor has just cause for complaint. There are few libel suits to-

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day. Newspapers no longer settle out of court, but fight. This discourages suits by the shyster lawyers who brought 90 per cent of the cases, and so does the New York rule that the plaintiff pays costs if awarded less than fifty dollars' damages.

A second effect of libel law on the contents of newspapers has occurred to me as possible, although I lack evidence on this point. A long trial which occupies several days is usually reported in our press in disconnected daily instalments. What happened yesterday becomes an isolated unit, and there is no effort to relate it to events on previous days. The reader is left to hitch the pieces together as best he can. This unsatisfactory slicing-up of a continuous investigation may be somewhat caused by the fear that any addition to a stenographic report of the evidence will not be protected by the defense which belongs to a fair report of judicial proceedings, so that the newspaper might have to pay heavy damages for any remarks of an unflattering nature about any party or witness in the case.

This shortcoming in the presentation of trials could, I think, be remedied without any statutory change in the defense of a fair report. If there were an insistent public demand for more enlightening accounts of American legal proceedings, comparable to the accounts of trials in the *London Times*, then some of our leading newspapers might be more courageous in meeting this demand, by prefacing the verbatim testimony of a given day with an accurate summary of the previous course of the trial and supplying an impartial explanation of the relevance of items in the evidence. Soon courts might come to accept such enlightenment of the public as part of a fair report of a trial and clearly within the recognised defense.

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### PROPOSED REFORMS IN LIBEL LAW

Although such information as the Commission was able to gather from newspapermen does not reveal any urgent demand for changes in the law of libel, there is a good deal in print about possible reforms, and the subject deserves some attention.

A good place to start is the frequent observation that libel law here is much less stringent on defendants than it is in England. A good many people talk as if changes in the English direction might be desirable.

Is the English law different and how? Despite the difficulty of statistical comparisons in an area of nonrepetitive facts like libel, it appears probable that English plaintiffs win verdicts more often than ours, and it is almost certain that the amounts awarded them run very much higher. For example, the Princess Youssoupoff<sup>28</sup> might not have gotten anywhere near \$100,000 in a single suit in the United States. Certainly she had much less cause for the complaint than the wrestler whose picture was published by a New York paper in an article on evolution with the caption "not fundamentally different from the ape in physique." Yet a New York jury gave him only a quarter as much as the London jury gave the Princess, and even his own lawyer was astonished by the magnitude of his victory.<sup>29</sup>

So far as I can discover, this greater English severity is not due to any important difference in the substantive law of libel. Our law was derived from English decisions. All the main rules previously outlined are applied by English courts as well as by our own. The only noteworthy divergence is that

<sup>28</sup> See the English case cited above, n. 2.

<sup>29</sup> See A. G. Hayn, book review, 53 *Harvard Law Review* at 834 (1945).



truth is still an absolute defense in England, whereas in a good many of our states (as already mentioned) truth is not protected if the jury finds it was published for an evil motive. Observe that this makes the English law more favorable to defendants.

The point is that English juries and courts enforce the same libel law as ours "with a severity that is to be found nowhere else."<sup>30</sup> Jurymen and judges are very sensitive to injuries to personal reputations. A shrewd old Providence lawyer, who had traveled widely, used to regard this sensitiveness as an index of higher civilization than our own. However that may be, it is probably due to the fact that English jurymen and judges live in a different intellectual climate from the fluid and migratory society of the United States. The Englishman is born into a definite status where he tends to stick for life. What he *is* has at least as much importance as what he *does* in an active career. A slur on his reputation, if not challenged, may cause him to drop several rungs down the social ladder. A man moves within a circle of friends and associates and feels bound to preserve his standing in their eyes. Consequently, *not* to sue for libel is taken as an admission of truth.

An able American has too much else to do to waste time on an expensive libel suit. Most strangers will not read the article, most of his friends will not believe it, and his enemies, who will believe it of course, were against him before. Anyway, it is just one more blow in the rough-and-tumble of politics or business. Even if his reputation is lowered for a while, he can make a fresh start at his home or in a new region and accomplish enough to overwhelm old scandals. A libeled

<sup>30</sup> David Riesman, "Democracy and Defamation: Fair Game and Fair Comment," 42 Columbia Law Review 1066, 1120 (1948). This reviews the less drastic operation of libel suits in Continental Europe.

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American prefers to vindicate himself by steadily pushing forward his career and not by hiring a lawyer to talk in a courtroom.<sup>21</sup>

Probably a second cause of the English situation is the greater control which judges exercise over juries in any sort of action. For example, judges can express their opinions about the honesty of witnesses and about the weight of the evidence on main issues; this is forbidden in most state courts. The English practice would permit the judge, in a libel suit, to guide the jury in applying the rules of law more than is possible with us, thus making verdicts less haphazard. The judge might also say something about the desirability of heavy damages, since he often comes from a group which is solicitous about reputation.<sup>22</sup>

Is the greater severity of English libel suits beneficial or harmful? This is a difficult question to answer. Riesman recognized that the British fascists made little headway, with the smearing campaigns against democratic and Jewish leaders, in contrast with the fatal success of such campaigns on the Continent. "But it is hard to say whether the comparative failure of the tactics of defamation is the consequence of the severity of the [British] law of libel, or whether that failure, and that severity, are not both facets of a general communal regard for privacy, decency, and reputation."<sup>23</sup> On the other side, Riesman reports that "liberal British publishers and writers believe that the libel laws prevent exposure of governmental and commercial scandals about which the

<sup>21</sup> See Riesman, "Control of Group Libel," 42 Columbia Law Review 787 at 790 (1948).

<sup>22</sup> Riesman suggests that the whole English process "may serve to impress aristocratic values on the common people, making them willing, as jurymen, to grant libel verdicts in sums that must seem to them fabulous" (*Ibid.* at 1191).

<sup>23</sup> *Ibid.*

public should be informed. . . . Within England, the consequence of covering up the faults and failures of the ruling class has been to entrench conservative and incompetent leadership and prevent essential social change." Recall the long suppression of Edward VIII's matrimonial project by British newspapers.

Whatever the answer, the question whether the English libel law works better than ours is about as profitable as asking whether a cockney accent sounds better than a Brooklyn accent. Even if it is better, it cannot be substituted over here without making over a social milieu. Similarly, our libel situation grows out of our mental attitudes and ways of life. For example, until state judges can exercise more control over negligence trials and criminal trials, it would be hopeless to try to give them the influence over libel suits which is exercised by their British confreres. Whatever improvements we make in libel suits must grow out of our experience.

Indeed, it seems more likely that England will move in our direction. A considerable body of opinion among British newspapermen and lawyers considers their libel law too drastic. Accordingly, proposed reforms have been embodied in drafts as the basis for parliamentary action.<sup>44</sup> Some of these suggested reforms appear more favorable to defendants than is the present American practice, but changes somewhat resembling them have been urged in the United States. Since libel plaintiffs are scattered individuals and libel defendants are usually found among highly organized mass media, it is not surprising that most of the pressure for legislation on both sides of the Atlantic is toward a milder libel law. Perhaps we

<sup>44</sup> For a good outline of these proposals, see Paton, "Reform and the English Law of Defamation," 33 *Illinois Law Review* 669 (1938). Several comments on the Empire Press Union's bill are cited by Riechman, 42 *Columbia Law Review* at 1120, n. 167.

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should not be surprised if English law abandons its solicitude for personal reputation. English writers have long been lamenting the "Americanization" of English life. The caste system to which English libel law is more or less related has sustained terrific blows from heavy taxes, two world wars, and, finally, a decisive victory of the Labour party. If big landed estates and big fortunes are doomed, why not big libel verdicts? Twenty-five thousand pounds for Princess Yousouppoff would be queerer than ever, especially if it is not taxable "income."

Next, I shall briefly sketch two broad proposals for relaxation in this country, which have some support in the English sources just mentioned.

First, some American and English lawyers<sup>32</sup> have urged that the law should in most cases limit recovery to "special damages." This means that the plaintiff must prove that he has already suffered a pecuniary loss because of the libel and further that he will be awarded only the money value of this actual harm. In other words, "general damages," which the jury can now estimate for the lowering of the plaintiff's reputation, will be largely eliminated. Libel will then become much the same as slander. This is exactly opposite to the tendency to make widespread oral defamation like libel, which is shown in recent radio cases.<sup>33</sup> However, general damages will not completely vanish. They can still be recovered if the libelous matter was published in bad faith.

This change seems to me altogether too favorable to defendants. There is considerable force in the following objections which were raised against it: It is hard to prove special damages. And as between the other two kinds of damages,<sup>37</sup>

<sup>32</sup> See Paton, *op. cit.*

<sup>33</sup> See above, pp. 79-80.

<sup>37</sup> The three kinds of damages were explained above, pp. 84-85.

punitive damages (in states which allow them) are more important than general damages, so it would not improve matters much if general damages be eliminated. Furthermore, a jury does not now consider the three kinds of damages separately, although the plaintiff's lawyer builds them up separately. In other words, the jury can always size up the case as a whole, so that an attempt to remove general injury to reputation from the jury's consideration would be pretty artificial. The law as it is, the argument ran, is sufficiently fair to defendants. If the libelous statements are true, this is a complete defense unless there was bad faith; and newspapers can usually establish good faith even when they make personal reflections on a candidate, for the jury may feel that such information is desirable. Whenever truth is not proved for every item, still its substantial presence goes to reduce damages. The law should not be changed so as to reduce them still further.

The second proposal is more persuasive. It seeks to protect an innocent defendant. The law would be changed to require proof that the defendant was somehow at fault—either he acted in bad faith or he was negligent. This reform would take care of several types of situations where a defendant can now be held for heavy damages although he did not intend to libel a living soul. One example has been mentioned already—that of the radio station owner who approves an innocent script and yet has to pay damages when the speaker interpolates scurrilous remarks about the plaintiff.<sup>22</sup> According to several decisions, the fact that the plaintiff is harmed because of the owner's business activity is all that there is to it; the owner's mental state is irrelevant. The new proposal is to make it material. So long as the owner did not intend to defame anybody

<sup>22</sup> Above, pp. 79-80.

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and used a proper amount of care to prevent such harm, he is to be protected. Pennsylvania already takes this position. Observe that this suggested new defense will not help the station owner who does not insist on a script; he is careless and must take his chances on what the speaker says.

Take a second example of innocent libel. A newspaper in X receives an AP dispatch saying that the mayor of Y has been indicted for assault with intent to kill. The X newspaper uses the item in its morning issue, just going to press. Unfortunately, the AP was mistaken; the indictment was only for reckless driving. The Y mayor sues the X paper. Although it trusted the AP and had no fair chance to investigate court records many miles away, the paper is liable by the weight of authority.<sup>39</sup> The proposal would let the paper set up a defense of due care. The mayor could sue the AP, but not the newspapers which honestly relied on the dispatch. A Florida court has permitted this defense.<sup>40</sup>

Come to the harshest situation of all. In the last situation the newspaper editor did know that the AP dispatch harmed the mayor though supposing the report to be accurate. But in several decisions the defendant did not suppose that what he said hurt anybody. (1) The producer of *Rasputin* thought he was depicting the imaginary Princess Natasha and not a live princess. (2) An American newspaper printed an advertisement of whiskey containing a testimonial letter from a customer with a photograph intended to be of the customer. Unluckily, the paper used by mistake the picture of a trained nurse, who said that this association with whiskey hurt her

<sup>39</sup> *Oklahoma Pub. Co. v. Gieson*, 67 Federal Reporter, 2d Series, 62 (C.C.A. 10th, 1933); *Wood v. Constitution Pub. Co.*, 57 Georgia Appeals Reports 135 (1937).

<sup>40</sup> *Layne v. Tribune Co.*, 108 Florida Reports 177 (1933).

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chances of getting patients. Justice Holmes upheld her right to damages for libel. The paper did harm her—that was enough.<sup>41</sup> (3) A London newspaper published a photograph of a sportsman at the races with a woman, whom it described as his fiancée because the sportsman had thus introduced her to the newspapermen. The paper had to pay libel damages to the sportsman's wife, who said the photograph gave her neighbors the impression that she had been living in sin with an unmarried man, who was about to forsake her for the dame he took to the races.<sup>42</sup> Yet the wife was not in the picture, and the photographer did not know a wife existed. There was not the slightest intention to hurt her, but the jury decided she was hurt and so she was paid. No American decision has gone so far as this, but Holmes's reasoning perhaps supports a similar result in this country. The proposed test of reasonable care to guard against defamation would not necessarily bar recovery in these cases. Perhaps there was enough in *Rasputin* to indicate the Princess Natasha might reasonably be identified with a surviving denizen of the czar's court. It was rather careless for the American newspaper to use the wrong photograph. There was a chance that the sportsman's married status could have been easily checked from *Who's Who* or a quick telephone call to some other horse-lover. The point is that the jury was never given a chance to pass on a defense of due care, so we do not know what the verdict would have been if that issue had been in the cases. It is proposed to change this and let the jury decide whether the defendant was to blame for the mistake; if not, no money will be paid to the plaintiff.

<sup>41</sup> *Peck v. Tribune Co.*, 214 United States Reports 185 (1906).

<sup>42</sup> *Cassidy v. Daily Mirror Newspapers*, Law Reports [1928], 2 King's Bench 251.

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Although there is a good deal to be said for this reform, I am not sure that it is desirable. One trouble is the difficulty of fixing the extent of the proposed defense of absence of fault. For example, a newspaper owner who repeatedly tells the editors and reporters to take endless pains so as to make all derogatory articles completely accurate is not really to blame if they disobey him and carelessly state the plaintiff was arrested, when a little investigation would have shown them that the prisoner was somebody else with a similar name. Yet this innocent newspaper owner ought not to be let off. A careful limousine owner is not excused when his chauffeur drives through a red light and injures a pedestrian. Somebody has to pay the hospital bills, either the pedestrian or the limousine owner, although neither is at fault; and the law considers it fairer to throw the burden on the motorist. It is one of the risks of owning a car. And paying for libels is one of the risks of the newspaper business.

If the newspaper owner's innocence is irrelevant, why should the innocence of the reporters and editors be a defense? The existing law says there is no difference. Of course, in the automobile cases there is a difference—somebody does have to be careless, either the owner or his chauffeur. If juries were allowed to make motorists pay for all accidents regardless of anybody's fault, the cost of owning automobiles would shoot skyward beyond the reach of the men of moderate means who need cars badly. But I have yet to learn of a newspaper which could not afford to pay for innocent libels, which, after all, are not very common. It is hard on the innocent newspaper to lose some money, but it is equally hard on the innocent victim of a mistaken charge of crime to lose his reputation and perhaps his job without any compensation. So the law has always thrown the loss on the newspaper.



Is it not equally fair to make paying for libels one of the risks of the broadcasting business? It is true that speakers are not employees like reporters, but does the distinction really matter in this connection? They are powerful helps in bringing in revenue to the station. The station owner is much better able to stand the loss than the man who has been falsely accused to thousands of listeners.

When the communications industries are getting bigger and bigger, they are not in a very good moral position to obtain legislation which will shift the burdens of defamation from their treasuries and throw it on the isolated victims. Perhaps some slight readjustments of the law are desirable to prevent such windfalls as went to the Princess Youssoupoff and the sportsman's wife, who were both lucky in being "libeled," but a statute for this purpose ought to be very carefully drafted. To establish a sweeping defense of absence of fault in libel actions would be unfair to many plaintiffs who deserve protection.

Apart from the question of compulsory correction of errors (to be discussed later), no changes in the law of libel are needed at the present time to enable the media of communications to serve society better. This is not saying that libel law is perfect. In many states some readjustments are very likely desirable, but these can be accomplished by local efforts. Furthermore, conditions may change during the course of years and call for modifications of the main rules. *Therefore, it would be good to organize from time to time a group of legal experts and representatives of the communications industries for the purpose of reporting on the operation of libel law and perhaps recommending reforms through nation-wide action by state legislatures.*

## **CRIMINAL LIBEL**

### **CRIMINAL LIBEL**

When a libel is outrageous, it may be prosecuted by the district attorney; and the defendant may be imprisoned besides having to pay damages to his victim in a civil action. The stock defamation of criminal libel is "defamation which tends to cause a breach of the peace," but the question whether a given publication will have that effect is plainly speculative. Consequently, this is a pretty loose kind of crime. Sometimes the law has been used to suppress heterodox views. Of course, everything depends on getting jurymen who feel sufficiently stirred up to convict the man.

There are not many prosecutions for criminal libel, and it seems to have no practical effect upon newspaper policy. The counsel for a large newspaper said that he had "not even bothered to know just what the law is."

## GROUP LIBEL

**U**NLIKE the two types of libel already examined, group libel is not usually recognized by the law as wrongful. The question is whether publications which defame groups should be made criminal or give rise to actions for damages brought by members of the injured group.

## SAMPLES OF GROUP LIBEL LEGISLATION

In order to make plain what I am talking about, I shall set forth four samples from this side of the Atlantic. The most wholehearted of these statutes was adopted in 1939 in New Jersey, where it was rapidly held unconstitutional. This made guilty of a misdemeanor

Any person who shall print, write, multigraph or in any manner whatever make or produce . . . any book, speech, article, statement, circular or pamphlet which in any way, in any part thereof, incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or groups of persons residing or being in this State, by reason of *race, color, religion, or manner of worship*. . . .<sup>1</sup>

Other provisions related to pictures, the circulation or sale of offending material, and speeches of the same character in the presence of two or more persons. Owners and managers of buildings were also punishable for knowingly permitting meetings where this law would be violated.

<sup>1</sup> *New Jersey Laws* (1935), c. 151 (my italics); *State v. Klapprott*, 127 *New Jersey Law Reports* 395 (1941).

## GROUP LIBEL

Illinois has an older and little-used statute punishing the public exhibition of any lithograph, photoplay, or drama which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" and exposes such citizens to "contempt, derision, or obloquy," or is productive of breach of the peace or riots.<sup>2</sup> Massachusetts recently extended criminal libel to include "false" material published "with intent to maliciously promote hatred of any group of persons in the commonwealth because of race, color or religion."<sup>3</sup> A Manitoba law provides that the circulation of a libel against a race or creed may be enjoined at the suit of any member.<sup>4</sup>

So far as I know, the Illinois and Massachusetts statutes are the only group libel laws now in force in the United States. However, the past few years have witnessed numerous efforts to get similar laws on the statute-books. An example is the New York bill to extend the criminal libel statute so as to include libel of a group as well as of a "corporation or association." A bill in Congress, introduced by Representative Dickstein of New York, has had considerable backing. This gives the Postmaster General power to bar from the mails any matter designed or intended "to cause racial or religious hatred, bigotry or intolerance."

Ought such proposed laws to be enacted?<sup>5</sup>

<sup>2</sup> *Illinois Criminal Code*, sec. 224a, as amended in 1917. See *People v. Simcox*, 379 Illinois Reports 347 (1942).

<sup>3</sup> *Massachusetts Annotated Laws*, c. 272, sec. 96C (enacted in 1943).

<sup>4</sup> *Manitoba Statutes* (1934), c. 23.

<sup>5</sup> The fullest account of the legal problems surrounding this proposed legislation, with a large amount of material on the corresponding situation in pre-war England and Continental Europe, is found in three articles by David Riesman on "Democracy and Defamation," 42 *Columbia Law Review*, 757, 1025, 1032 (1942). I am much indebted to his research.

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### ARGUMENTS FOR GROUP LIBEL LEGISLATION

*Prevalent evils of group vilification.*—A systematic avalanche of falsehoods has poured forth of late years concerning various groups, classes, and races. Defamation was a major weapon in the rise of the Nazis to power in Germany and then was employed in the world-wide struggle of fascism against democracy. America has not been immune either to the struggle itself or to the methods of anti-Semitic propaganda and other defamatory attacks on symbolic individuals and groups. Doubtless, the defeat of fascism in the war has rendered these evils less acute than when the New Jersey statute was enacted in 1939, but everybody is aware of the continuance of racial and religious resentments which may flare up dangerously at any moment. And the instrumentalities of communication can do much to fan the smoldering embers into flame. Consequently, the consideration of possible remedies for these evils remains an important task for all thoughtful citizens.

*The inadequacy of existing law.*—It is natural for those who suffer from these evils and those who deplore them to think that the law ought to provide effective remedies; and they are confronted by the fact that the existing law is almost incapable of punishing or otherwise discouraging the individuals and organizations who are deliberately stirring up racial and religious hatreds.

The American criminal law does little to protect religious groups and other minorities from language promoting hostility. Prosecutions are rare and none too likely to succeed. For example, Robert E. Edmonson, publisher of the *American Vigilante Bulletin*, was indicted in New York City for a libel against "all persons of the Jewish Religion."<sup>1</sup> The statute limits criminal libel to a malicious publication which defames

<sup>1</sup> *People v. Edmonson*, 166 New York Miscellaneous Reports 142 (1906).

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"any person" or injures "any person, corporation, or association of persons" in his or their business. The prosecution failed because no individual Jew was libeled. Judge James G. Wallace held that the statute did not cover an attack "against so extensive and indefinable a group or class."

A further difficulty is that speeches at meetings and on the streets, although often provocative of trouble, are not libel. Sometimes they can be prosecuted as disorderly conduct or breaches of the peace, but the penalties are light and conviction is not easy. If the speaker sees police at the meeting, he may call attention to their presence and start telling how "the Eskimos dominate America." Even invective and abuse are sometimes ruled not to be defamatory, for example, when a speaker in New York City said: "We Christians, especially Catholics, should exterminate the Jews just like Hitler did in Germany, and is now doing in Poland." After all, the orator did not charge Jews with any bad qualities or acts.

An action for damages based on defamation of a large independent group raises additional objections, for now there is no one, like the district attorney in criminal cases, who has a definite right to set the legal machinery in motion. I am not speaking of attacks on a corporation, which of course can bring libel suits, or on a definite unincorporated body like a trade-union, which has some chances of relief though none too good. What we are interested in is the protection of amorphous groups like Catholics, Protestants, Jews, Negroes, Mexicans, etc. Such a group is not organized so as to give specific officers any standing to represent it as plaintiffs. One member has just as much claim to vindicate the wrong to the group as another. Suppose that a newspaper makes some unwarranted charge against "Harlem Negroes" generally. If a court were to let Mr. Adams of Harlem maintain a libel

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action against a newspaper, it would have to grant a similar privilege to Mr. Johnson and Mr. Washington and every other colored inhabitant of Harlem. Perhaps this multiplicity of redress would be manageable if the purpose of a suit were to enjoin the group libel. After Mr. Adams, say, had got his injunction and stopped the lie, Mr. Johnson and Mr. Washington would have nothing to gain in paying lawyers to start more injunction suits. The job would be done. But that is not the way a libel action works. Mr. Adams cannot get the newspaper enjoined; our law does not allow this. Damages are the only relief given in civil actions for libel.<sup>7</sup> Now, an amorphous group has no way to bring an action for money as a unit; and even if damages were allowed to be collected by Harlem Negroes as a class, how could they be distributed? The class has no single fund like a corporation or a labor union. If the law permitted Mr. Adams to collect damages merely because his race was vilified, the courts would be equally open to any other member of the group who cared to sue. What a field day! Because of a single statement, a newspaper might be forced to defend thousands of libel actions and have to pay over and over again whatever damages each successive jury chose to award. In the absence of any available standard for measuring the injury to each plaintiff, jurymen could take the sky as the limit for damages, and appellate courts would lack any test for reviewing generous awards of cash. Plainly, damage actions of the ordinary sort are very much unsuited to handle situations where an agitator vilifies a whole group without naming individuals.

It often happens, however, that the vilifiers attack an individual as a symbol of the hated group to which he belongs. Here a libel action for damages does not present the obstacles

<sup>7</sup> See above, pp. 88-94.

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just mentioned; this man clearly has a standing in court. Still, plenty of other difficulties remain. The rules of defamation which I have set forth previously were designed for old-fashioned situations where the plaintiff was slurred for his own sake. They are not adapted to stamp out a systematic campaign to attack a race or a creed by singling out particular victims. A shrewd defendant can constantly take advantage of settled rules of libel law. For example, if a vilifier seeks to hit at all Jews by publishing a pamphlet asserting that President Roosevelt and his sons are Jews whose ancestor was named Rosenfeld, the assertion is false, but if one of the younger Roosevelts sues for libel, what good will it do him? The defendant can easily persuade a court that the statement is not defamatory. Indeed, a plaintiff cannot say that the name of "Jew" is disgraceful without admitting exactly what the anti-Semites contend.

Furthermore, the traditional rules of defamation developed during the determination of familiar issues in a fairly homogeneous society. The administration of these rules becomes very unsatisfactory when novel controversies arise on which judges and juries are either emotionally swayed or uncertain what ought to be done in the entire situation before them. Libel verdicts ought to reflect public opinion, but here, as Riesman says, we have instead "many levels of opinion." He writes:

"[In] the cases which have come up, and will come up, in the political struggle . . . the community is likely to be seriously divided and feeling on either side is likely to be intense: whether it is 'nigger-lover' or 'Jew-lover'; 'anti-Negro' or 'anti-Semite'; 'fascist' or 'Red'; 'agitator' or 'anti-union.' How are the courts, in cases of this character, to escape a morass of prejudice, happenstance, and guesswork?"<sup>3</sup>

<sup>3</sup> 42 Columbia Law Review at 1302 (1942).



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A libel trial becomes as turbulent as a football game, with the two parties forming cheering sections in the courtroom. In Germany this ripened into an "ideological war in the courts." Partisans of anti-Semitism turned from being sued to suing. Hitler as plaintiff under cross-examination shouted, amid his followers' cheers: "I won't let myself be insulted any longer! They are trying to stage a bit of political propaganda! I won't answer these Jewish lawyers any more!" So in this country Father Coughlin's chief spokesman in Congress, Representative Sweeney of Ohio, brought seventy-five actions against Pearson and Allen, their syndicate, and the newspapers carrying their column, for charging Sweeney with opposing the appointment of a federal judge because he was a Jew and not born in the United States.

### ARGUMENTS AGAINST GROUP LIBEL LEGISLATION

Since the existing law of criminal and civil libel is plainly unable to cure the undoubted evils of group vilification, it is natural that some influential people should favor new legislation specifically directed against these evils. This is the most obvious remedy, but it is not on that account necessarily the best remedy. It may even be a bad remedy, which will do much more harm than good.

*Group libel laws will discourage open discussion and are probably unconstitutional.*—Violation of constitutional free speech was one reason why the New Jersey statute was held invalid. Chief Justice Brogan said:

To denounce one's fellows or advocate hostility to them, or to a group, because their origin began in a north country or a south country or because of creed or color is as revolting to any fair-minded man as it is absurd and unjust to the mind of a thoughtful man; but nevertheless to make the speaker amenable to the criminal law for his utterances they must be such as to create a "clear

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and present danger that will bring about the substantive evils" to society . . . that the state has the right to prevent. The utterances must be such as constitute a danger to the state.<sup>9</sup>

It is significant that, when Edmonson was prosecuted for his anti-Semite publication, his release without trial was urged by the American Jewish Committee and the American Jewish Congress, who intervened as friends of the court. They condemned his conduct morally but stated their belief that freedom of the press and religious liberty meant that he ought not to be punished for expressing his opinions. The reasons they gave against stretching the existing New York statute so as to penalize group libels are just as good an argument against enacting a new statute to accomplish the same result. Judge Wallace said:

As is so well pointed out in the briefs . . . it is wiser to bear with this sort of scandalmongering rather than to extend the criminal law so that in the future it might become an instrument of oppression. We must suffer the demagogue and the charlatan in order to make certain that we do not limit or restrain the honest commentator on public affairs.

And when one realizes how many forms of religion might consider themselves libeled and seek legal redress, were our laws so extended, and when we reflect on how our courts might, in such event, find themselves forced into the position of arbiters of religious truth, it is apparent that more would be lost than could be gained by attempting to protect the good name of a religion by an appeal to the criminal law.

In short, matters which ought to be debated and discussed may be kept under cover by a group libel law. The honest writer may keep silent for fear that, if what he wants to say ever gets before a jury, he may have to pay a heavy fine or go to prison. The proposed group libel statutes come close to the eighteenth-century law of seditious libel, which the framers

<sup>9</sup> *State v. Klapprott*, 127 New Jersey Law Reports at 403 (1941).

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of the First Amendment detested. Under that law a seditious intention was defined to include an intention "to promote feelings of ill-will and hostility between different classes of His Majesty's subjects."<sup>10</sup> Although this form of sedition became obsolete in England a hundred years ago, it continued on the Continent, sometimes into the twentieth century. A French law of 1822, punishing those who publicly sought to disturb the peace by inciting citizens to contempt or hatred against one or more classes of persons, covered mere derogatory expressions like "down with the priests" or "... the aristocrats" or "... the bakers." A Spanish law on this model was applied in many cases to attacks on the Catholic clergy, various Catholic orders, the General Staff, and the magistracy, the last as late as 1929. In Germany, in 1917, pamphlets assailing warmongers and moneybags were held to be directed against capitalists as a class and punished accordingly. In Posen, twenty years before, the Poles were punished for poetry attacking the Germans of the district, while in Italy a workmen's song fell under the ban by recounting how the rich steal the bread of the poor.

This European experience shows that, unless the statutory reference to groups is carefully limited, unexpected kinds of groups may claim protection against abuse—lawyers, let us say, or professors, politicians, plumbers, Congress, and even those frequent victims of false charges, the very rich.

Of course, if the statutes are confined to libels on races and creeds, some of the economic and social discussion just referred to will not be affected. But if group libel statutes are the right way to cure group dissensions, why should we stop with quarrels among racial and religious groups? The community is equally imperiled by class warfare, by strikes which

<sup>10</sup> 9 Halsbury's Laws of England (2d ed., 1933) 302; FSUS, p. 506.

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cut off the necessities of life from great cities, by the misery of sharecroppers. If Jehovah's Witnesses must never be slurred, why should the C.I.O. or savings banks or co-operatives or railroads submit to unwarranted vilification without any redress? Once you start group libel laws, every influential body of men will urge that it has an equal claim to be protected by such legislation. And the wider the protection, the narrower becomes the field for unimpeded discussion of public affairs.

As so often happens with sedition statutes, the people who will actually get punished or protected will be very different from the people whom the original supporters of the legislation have in mind.

Especially dangerous to open discussion is the proposed federal postal law. This would allow some intolerant official in the Post Office Department to stop the circulation of a magazine which questioned the foreign policy of the Vatican or discussed Zionism or argued for the repeal of Jim Crow laws or southern poll taxes. Since any such article does arouse resentment among racial or religious groups, the official could readily rule that the article was unmailable because it was designed, in the words of the proposed statute, "to cause racial or religious hatred, bigotry or intolerance." Such a law offers a tremendous latitude for interpretation.

*Group libel laws will work badly.*—In the first place, they will lead to constant and difficult litigation. Such statutes are necessarily vague. This was another reason for upsetting the New Jersey statute punishing advocacy of "hatred, abuse, violence or hostility" against racial and religious groups. Chief Justice Brogan pointed out the indefiniteness of the words "hatred," "abuse," "hostility." When does ill-will become hatred? When do untrue statements become abuse?

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The statute left the jury free to decide when one of these emotions was aroused in the mind of a listener as a result of the language in question. The Chief Justice declared:

Nothing in our criminal law can be invoked to justify so wide a discretion. The criminal code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit.<sup>11</sup>

Even the issues which are familiar in a civil libel suit will become much more uncertain in a group libel case. It is easier to tell the effect of a statement on an individual's reputation than on the reputation of a group; and it is easier to judge whether the statement is true or not. What is truth in group libel? Any group can be defamed by dragging up obnoxious acts by some of its members. Suppose an attempt to stir up racial prejudice by a lurid but accurate description of actual crimes by thirty different Negroes. Every fact is true, but the imputation that all Negroes are responsible for these outrages is utterly false. Can the defendant maintain a plea of truth or not? Or suppose that a scurrilous anti-Semitic sheet keeps saying in great headlines: "The Jews crucified Jesus." Does this violate the group libel law?

Secondly, when such vague issues have to be decided by men who reflect the very dissensions in the community at which a group libel law is aimed, the operation of the law becomes a matter of emotion or chance. What Riesman says about "many levels of opinion" is very significant. Whether prosecutions will be brought will depend greatly on the group affiliations of the district attorney and his staff. The outcome of a trial will depend greatly on what group is represented on the jury. And whichever way the verdict goes, the effect will be unsatisfactory. If the vilifier is convicted, the sentence will

<sup>11</sup> *State v. Klapprott*, 127 New Jersey Law Reports at 402 (1941).

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be too short to deter repetitions, and yet his supporters will hail him as a martyr. If he is acquitted, he will walk out of the courtroom in triumph and become more insolent than ever. The defeat of prosecutions by acquittals or hung juries is very probable unless the community is closely united; then there was no need for group libel laws in the first place.

In short, group vilification is a problem which calls for intricate social regulation, and criminal prosecutions are clumsy tools for such a delicate task.

*Group libel laws will increase dissension between groups.*—A prosecution under such a statute will line up all the elements of the community into opposing camps. There will be a centralization of prejudice, whereas the safeguard is in its dissipation. Thus the law raises issues instead of settling them. For example, the New Jersey law was applied in one town against Jehovah's Witnesses for their attacks on Catholics. Whereas previously no Catholic issue had arisen in the community, now the town became divided into pro-Catholics and anti-Catholics just because of this law. In general, the more you bring group prejudices into the arena of legal controversy, the more you raise the issues you are trying to allay.

*Group vilification is a symptom of evils which group libel laws cannot reach.*—Group libel laws are most urgently sought when society is disintegrating, and then no law will help. Fortunately, our society has not yet come to such a pass, but it is important to realize that the group vilification we now have is a result of the fact mentioned in chapter 1 of this book, that the American community is split into groups, with consequent feelings of ill-treatment and outbreaks of violence. It is futile to relieve the symptom and do nothing to cure the disease. So long as we have bitter underlying antagonisms between races and creeds and economic classes, it is useless to



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stamp out the public expression of those antagonisms. The published scandal sheets and the blatant speeches in halls or on sidewalks are much less a reason for anxiety than the fact that some of our citizens are building up a large body of subterranean comment which frankly sets out to irritate the hate nerve. Group libel laws will not touch this interchange of poisonous remarks in conversation and letters. They will only make it worse. The less one can say publicly, the more he will say in private. The very suppression of publications and meetings is made a fresh cause for hatred of the opposing group, which is accused of controlling the officials who do the suppressing. The idea will be quietly passed from man to man: "If those so-and-sos won't let us show them up in print, we'll find some other way of doing them in!" Group vilification is superseded by group violence.

Furthermore, some of the most damaging expressions of group antagonisms might not fall within a group libel statute. What we have is not so much direct group libel but the libeling of individuals who are taken as representative of their groups. The most vicious process is the denunciation of the individual typical of the group—one Catholic, one Jew. As one member of the Commission remarked: "This is where the thing lives, and group libel laws are poppycock because they don't get down to where the thing lives."

In order to take care of such libels on a single member of a group, we do not need a new law. The existing rules of civil libel actions are adequate if they would only work well. I have already shown why those rules break down because of the many levels of opinion in a community. That demoralizing factor must be reckoned with, and it will make little difference whether the vilifier is sued for damages under the present law or prosecuted under a new statute. In either case, the com-

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munity will be at odds on the question whether he deserves to be severely penalized for expressing the particular opinion.

When the situation is so demoralized, the government is able to do very little about mere language. It had better confine itself to its primary tasks of maintaining order and stopping violence. What we need most from the law at the present time is vigorous and even-handed action by the police. If they will put an immediate stop to the badgering of school children who belong to an unpopular group and physical assaults upon adult members of such a group, they will have enough to do without being asked to arrest the authors of vituperative pamphlets. Perhaps a new civil action for compulsory correction of misstatements might also help a little. I shall come to that question later. But the main job of the law in curing the evils of group dissensions is to keep the peace.

Because of such arguments as have just been set forth, *the Commission on the Freedom of the Press was unanimously opposed to the enactment of group libel legislation.* The Commission fully realized the seriousness of the evils of group vilification and the inadequacy of existing legal remedies. Therefore, it strongly believed that methods must be found to combat racial and religious and economic antagonisms. In its opinion such methods must be largely sought outside the law. Extra-legal methods are available, such as the activities of inter-group conciliatory organizations and continuous efforts in the schools. The press can give valuable help by bringing these antagonisms into the area of rational discussion and mutual adjustment. At the present time there is too much hush-hush about such matters in newspapers of large circulation. They are so anxious not to offend any group that they behave as if

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group antagonisms did not exist. Such timid silence is one of the causes of the vilification in the subsidiary press. When wise men refuse to mention disagreeable facts, foolish and stupid men will have their say more than ever. The responsible leaders of the press ought frankly to face the facts of group dissensions whenever a proper occasion demands. When the evil is thus frankly faced, its size will be seen to be smaller than is commonly supposed, and methods for reducing it still further can then be satisfactorily explored. The remedy for bad discussion is not punishment but plenty of good discussion.

## 6

### OTHER STATEMENTS INJURIOUS TO INDIVIDUALS

**H**ITHERTO I have been considering defamatory statements, which lower the reputation of a person or groups of persons. It is also possible for an individual to be harmed by publications which do not accuse him of anything disgraceful.<sup>1</sup> I shall review three types of nondefamatory statements. Two of these types are redressed by existing law, within rather narrow limits. The third—invasion of privacy—is hurtful in fact but is ignored by the law of most states; and I shall discuss whether the law ought to recognize a right to privacy.

#### INJURIOUS FALSEHOOD

An untrue statement that Tom Jones is a Republican is not libel because it is not defamatory; it does not bring him into hatred, ridicule, or contempt. Yet it may prevent Jones from getting a public job under a Democratic regime. If so, he may perhaps recover damages from the liar. This action for injurious nondefamatory falsehoods is narrower than a libel action, because now it is essential for the plaintiff to prove both actual harm suffered and bad faith (absence of a proper motive for the defendant's statement). Although a newspaper

<sup>1</sup> Infringement of copyright is not here discussed, though it might logically be included. The copyright law can most conveniently be treated under the "Affirmative Activities of Government" in Part II (chap. 20), because it is primarily designed to encourage publication and not to interfere with it.

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may occasionally have to defend an action of this sort, this branch of the law probably has very little effect on newspaper policy.

### DISPARAGEMENT OF PROPERTY

If a newspaper says that John Smith sells gasoline with water in it, this is not necessarily libelous, for Smith may be ignorant of the defect. It would be defamatory to charge him with knowingly selling watered gasoline. Yet even the milder charge against the quality of Smith's merchandise may cause him to lose business. If so, he will perhaps be able to get damages. This wrong runs down property and not the reputation of an individual. Other common examples are when one man falsely says that another's title to land is defective or that a patent is invalid. Here the title to property is slandered.

The scope of this liability to pay damages for disparaging the title or quality of property is narrower than in libel. It closely resembles the liability for injurious falsehood. In both actions the plaintiff must establish a real loss of his own and bad faith on the defendant's part. Here is an illustration of the difference between libel and disparagement of property. (1) I incorrectly write that Popeye's breakfast food contains nothing nourishing. I am not liable if I honestly believe this or if sales are not affected. (2) But if I incorrectly write that Popeye is knowingly selling worthless breakfast food, then I am liable, no matter how much I believe my statement and even if Popeye sells more than ever. Of course, a fall in sales or other proved pecuniary loss will increase Popeye's damages for libel, but he has an action anyway because of the slur on his honesty.

Now, it is often stated that newspapers are reluctant to give their readers information of the sort supplied by Consumers' Research and similar groups. If this be true, it is con-

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ceivable that the soft-pedaling is somewhat caused by fear of actions for disparagement of property. The possibility of paying damages for statements about the poor quality of food, drugs, tires, etc., if they be found false by a jury, might perhaps discourage a newspaper from making truthful statements on such matters because of the difficulty of convincing a jury that the disparaging matter is true. Furthermore, the law might also discourage responsible persons from giving consumers this desirable help through other media such as the subsidiary press, books, and the radio.

It must be frankly admitted that this conjecture of mine is wholly uncorroborated. None of our informants thought that the apprehension of this sort of lawsuits affected newspaper policy. One editor said that fear of loss of advertising was a sufficiently strong motive by itself to bring about timidity in the criticism of products. Another editor, although repudiating this explanation, attributed the scarcity of newspaper information about the merits of commodities to the fact that a newspaper could not have confidence in the accuracy of statements on this subject. Such confidence was possible when the Federal Trade Commission had established the defective quality of particular goods; and some metropolitan journals do print material from this commission. Editors seem unwilling to place a similar reliance upon material from organizations like Consumers' Research. It was also objected that the task of reviewing new commodities, in the way newspapers notice new books and plays, would be tremendous and expensive and would lead to accusations of favoritism. Whatever the validity of these various explanations, fear of lawsuits is not one of them.

Negatively, the newspapers have done much to improve what the consumer learns about products. They took an ac-

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tive part in promoting the so-called "Printers' Ink Statute," which punishes false advertising and is now law in more than half the states.<sup>2</sup> Self-regulation is also at work; the communications industries are more sensitive than formerly about accepting questionable advertisements. Our concern, however, is on the affirmative side. The advertising columns may print fewer lies, but why don't the news columns print more truth?

It still seems to me possible that the law of disparagement of property may have some bearing on the problem. A newspaper cannot review commodities with the same assurance of immunity for good faith which the law gives to reviews of books and plays. The vital distinction lies in the principle that the law does not protect misstatements of facts by critics, but only damaging opinions based on actual facts. Now, with books or plays, it is pretty easy for a critic to get his facts straight and sail right on to his judgments. With breakfast foods and gasoline and tires, on the contrary, the facts are obscure and highly controversial. A solid basis for judgments is lacking. When the Federal Trade Commission has made findings of fact, they can be safely published because faithful reports of government proceedings are privileged just like the press reports of testimony at criminal trials. When this special safeguard is lacking, a frank discussion of the qualities of a commodity would invite a lawsuit. The consumer receives little benefit unless given statements of fact to back up opinions, and how can a newspaper owner be sure that a jury will not find that his paper had the facts all wrong?

Still, since no newspaperman expresses worries about this part of the law, I make no recommendations for changes.

<sup>2</sup> See Handler, "False and Misleading Advertising," 39 Yale Law Journal 22, 31 (1929).

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### INVASION OF PRIVACY

Thus far this portion of my book has dealt mainly with false communications. Yet even true statements about the intimacies of a person's life may cause him serious annoyance if spread abroad in print, regardless of the absence of defamatory implications. The law of most states gives little relief against undesired publicity. Over half a century ago Louis D. Brandeis and an associate published a famous article, "The Right to Privacy,"<sup>3</sup> calling attention to "the next step which must be taken [by the law] for the protection of the person, and for securing to the individual . . . the right 'to be let alone.' " The article thus depicts the need for a legal remedy: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons. . . ."

About a decade later a flour company plastered the New York landscape with placards showing the photograph of a lovely girl, with the legend: "Flour of the Family." The girl, who had not consented, sought an injunction and damages, all in vain.<sup>4</sup> The New York legislature, indignant over the fair girl's wrongs, enacted the next year a statute<sup>5</sup> for the benefit of "any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade" without his previous consent in writing. The of-

<sup>3</sup> 4 Harvard Law Review 193 (1890).

<sup>4</sup> *Roberson v. Rochester Folding Box Co.*, 171 New York Reports 538 (1902).

<sup>5</sup> Now New York Civil Rights Law, secs. 50, 51.



## OTHER INJURIOUS STATEMENTS

fender is subject to damages and an injunction and even to a criminal penalty, though this has never been invoked.

To date New York is the only state with legislation on the subject. A few states, notably Georgia, Kentucky, and California, have adopted the Brandeis views without a statute. Other states, such as Rhode Island, have flatly denied a remedy.

As a matter of decency, newspapers should undoubtedly have more respect than many of them do now for the desire of private persons to be let alone. Freedom to be ignored is important, but I am not at all sure that it should be protected by law or that other states should be encouraged to copy the New York statute.<sup>6</sup> The law has not worked very well in New York. Hardly any suits under it have been brought for the sort of gross wrong exemplified by the "Flour of the Family" billboards. In the most important case, *Binns*, the heroic wireless operator who kept sending out SOS calls when the "Republic" was sinking, got an injunction against a fictional movie in which an actor impersonated *Binns*.<sup>7</sup> In several cases where relief was deserved, it could have been obtained under the law of libel or unfair competition. The statute has been used to obtain relief which was not deserved. For example, it was applied against a street railway which paid for the plaintiff's photograph and used it on placards to illustrate the proper way to get off a trolley car but neglected to obtain more than her oral consent.<sup>8</sup> In another case the defendant produced and was exhibiting a short motion-picture intended to portray life in various neighborhoods of New York City.

<sup>6</sup> See "The Right of Privacy Today," 43 *Harvard Law Review* 297 (1929).

<sup>7</sup> *Binns v. Vitagraph Co.*, 210 *New York Reports* 51 (1913).

<sup>8</sup> *Almind v. Sea Beach Ry. Co.*, 157 *New York Appellate Division Reports* 230 (1913).

## OTHER INJURIOUS STATEMENTS

The only parts rehearsed were those of two sightseeing teachers and their guides, played by professional actors. All other action was a faithful reproduction of the activity of the city's inhabitants. For about six seconds of the seventeen minutes required to project the film there flashed upon the screen a close-up of a woman engaged in her daily occupation of selling bread on a street on the Lower East Side. She had been photographed without her knowledge or consent. So she obtained an injunction against further exhibition of her picture.<sup>9</sup> Nothing could show better the dangers which lurk in a broad statute.

Although we need not concern ourselves with unauthorized pictures in advertising or with fictional movies, the case just described reveals the impact of the right of privacy upon documentary films, which the Commission on Freedom of the Press regards as very important. How about regular newsreels? In another New York case, a high-school girl had disappeared for months, and an amateur woman detective was photographed discovering the body in a cellar. The newsreel was exhibited, and stills on posters outside the theater heralded "The woman who succeeded where police failed—Mrs. Grace Humiston." The detective, not having given her written consent, got an injunction in the trial court. This was eventually reversed on appeal. Although the statute literally applied, the court said that the communication of current news in either newspapers or motion pictures was not such a "trade" as the legislature had in mind. Otherwise, "the exhibition of a motion picture of a public parade would . . . subject the defendant to prosecution for crime." A baseball or football game

<sup>9</sup> *Blumenthal v. Picture Classics, Inc.*, 235 New York Appellate Division Reports 570 (1932), affirmed in 261 New York Reports 504 (1933), adversely criticized in 47 Harvard Law Review 1208.

## OTHER INJURIOUS STATEMENTS

could not be shown without the written consent of every player and every spectator whose likeness was distinguishable.<sup>10</sup> This subordination of the right of privacy to the public interest in news is probably sound, but the fact that four out of the seven judges who participated at various stages favored an injunction shows that news is not inevitably exempt from such a statute.

Times have changed since Brandeis wrote in 1890. Seeing how society dames and damsels sell their faces for cash in connection with cosmetics, cameras, and cars, one suspects that the right to publicity is more highly valued than any right to privacy. And the New York muddle hardly bears out the Justice's high hopes. *So I recommend that respect for privacy be left to public opinion and the conscience of owners and editors.*

<sup>10</sup> *Humiston v. Universal Film Mfg. Co.*, 189 New York Appellate Division Reports 467 (1919).

## INACCURACIES GENERALLY

**T**HE law does not now enforce accuracy for its own sake. It does sometimes determine the issue of truth in damage suits for libel, but only as an incident to the main purpose of redressing injuries suffered by individuals. The reason for punishing criminal libel was to keep the peace, and the law cared so little about truth that in the old days it could not be raised as a defense. So long as the publication was defamatory, the courts would not permit any inquiry whether it was false or not. Hence the misleading maxim, "The greater the truth, the greater the libel," which was never sound for civil libel and has long been altered in criminal cases by legislation.

Has the time come for a more drastic legal attitude toward disregard of truth? As mass communications are operated today, deliberate lies and irresponsible errors can do vast harm to society. Imagine a widely published statement that all the banks are about to close their doors, as they did in March, 1933. Nobody can sue for libel, for no particular person or bank is defamed. Yet the lie is much more hurtful than if it were made about a single bank, which could recover damages. The assertion that Mr. Roosevelt invited the attack on Pearl Harbor in order to get us into the war can be broadcast with impunity, because the law does not recognize libel of the dead. False statements in the press about other countries can easily ruin delicate negotiations and bring hostilities nearer, but

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there is practically no legal consequence. Even if Stalin, let us say, is grossly defamed, he is unlikely to go to the trouble of vindicating himself by suing one of our newspapers in an American court. Instead, the American people as a whole will pay the penalty for this exacerbation of international relations.

The Commission was much concerned over this problem of inaccuracies. We gave repeated consideration to the possibility that the law might check the distribution of false news by criminal penalties just as it now punishes the false branding of canned goods. It was urged that citizens ought to be protected in the right to receive their mental food unadulterated, that enemies of society should not be allowed to poison the wells of public opinion.

In the end, however, the Commission concluded that the criminal law was not well adapted to handle this problem. The situation resembles that already discussed in connection with group libel laws. The evils are great and there are no existing legal remedies, but governmental interference will do much more harm than good. Most of the familiar arguments for freedom of the press apply with special force to the suggested crime of inaccuracy. The danger is particularly strong that officials would use the threat of prosecutions in order to strifle criticism of themselves and their cherished policies. The chief purpose of the proposed law is to stop false statements in controversies of public importance, so that assertions in such controversies which happened to displease persons in power would be most likely to be prosecuted as false. *But are they false?* The officials may say so, even the judges may say so, and yet the distasteful assertions may still be true. Consequently, the existence of a penalty against lying would add to the dangers of telling unwelcome truths and thus impair the

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courage of disclosure, which is one of the great values of freedom. Much news reporting and much writing of recent history would become hazardous occupations.

Besides endangering freedom of the press, the new remedy would not work well. A criminal trial would not furnish a convincing determination of the truth or falsehood of assertions in newspapers and radio broadcasts. The difficulties of proof would usually be much greater than when truth is in issue in a libel suit. If the defendant newspaper has charged a surgeon with leaving a sponge inside his patient during an appendectomy, the question whether the sponge was there or not can be answered with the help of the kind of evidence with which judges and juries are familiar. Now, visualize a criminal prosecution of a newspaper for asserting that Mr. Roosevelt planned Pearl Harbor. The jury would be obliged to listen for weeks to the same sort of tangled testimony which was produced in the recent Senate investigation of the events of December 7, 1941. Again, the story that the Russian government imprisoned sixteen Poles in violation of their safe-conduct is frequently said to be a false statement by which the press imperiled the success of the San Francisco Conference. Imagine a trial in the United States of some newspaper which printed this story. In order to prove whether it was true or false, witnesses would have to be imported from eastern Europe, language barriers must be surmounted, the intricacies of Soviet officialdom would be explained every which way.

Of course, some socially damaging statements can be disproved by objective evidence as readily as a private libel. If the organ of a municipal machine has reported that the city's water supply is perfect, a few polluted samples from household faucets will be unanswerable. But such plain misstatements of fact are not likely to be prosecuted under the pro-

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posed legislation. The falsehoods which really matter are those which poison relations between classes and between countries, and these are hard to demonstrate convincingly in court. Judges and juries are not promising instruments for the nice measurement of historical or economic accuracy, especially when the emotions of a community are heated. Although there is a hard core of "fact" in the kind of statements which we are now considering, the question of what happened in the world of the five senses is overlaid by a multitude of inferences from external events. A sharp separation cannot be made between facts and their interpretation. Interpretations, however, are governed by basic presuppositions and schemes of value. These presuppositions may be contradictory among various parties and cultural groups and may, therefore, lead to contradictory conclusions about the significance of facts. Hence interpretations which seem sound to the writer and his supporters will often be considered grossly unfair by those on the other side of the dispute. Under such circumstances the decision about the veracity of a statement loaded with political implications is very likely to depend on the jurymen's previous views. At any rate, friends of the losing side will discount the verdict as biased, whether it is so or not, and will go on believing what they did before. The trial will not serve to enlighten the public.

Questions about Pearl Harbor and the fate of the Polish opponents of Russia and the genuineness of the Protocols of the Elders of Zion are appropriate for a body of trained historians, not a judge and jury. And even scholars of distinction cannot be trusted to remain free from bias while political controversies are raging. For example, at the time of the annexation of Bosnia to Austria, Friedjung, a distinguished Austrian historian, wrote a report upholding the genuineness of certain

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documents which the government had produced to show the treasonable conduct of leading Serb sympathizers in the Austrian Parliament. These documents were later proved to be forgeries.<sup>1</sup> Also, apart from bias, the judgment of scholars upon a controversy may be refused acceptance by a considerable portion of the community. Witness the report of the Lowell Commission on Sacco and Vanzetti. When scholars fail to give a convincing demonstration of truth, the hurly-burly of a criminal trial is not likely to do the job.

Courts now have troubles enough with political and economic issues whenever these happen to stray into cases involving recognized crimes. The conviction of Sacco and Vanzetti for murder may have been influenced by the way their anarchistic views were brought out during the trial. During the prosecution of Abrams and other Bolshevik sympathizers in the last war for vaguely suggesting strikes in munition factories in order to stop the dispatch of American troops to Murmansk and Vladivostok, the trial judge was faced with the dilemma of either leaving the defendants' intentions inadequately explained or else permitting extensive testimony as to the justifiability of American intervention in Russia and its relation to the war with Germany.<sup>2</sup> In another Espionage Act case, three Socialists had published a long pamphlet about the war, of which one sentence said: "Our entry into it was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked." This was prosecuted as a false statement intended to interfere with the success of the armed forces. Both the jury and a majority of the Supreme Court decided that the state-

<sup>1</sup> S. B. Fay, *The Origins of the World War* (2d ed., 1936), I, 384.

<sup>2</sup> See FSUS, pp. 117-21.



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ment was criminally false.<sup>3</sup> Fifteen years later the Nye Committee of senators investigating munitions manufacturers seemed determined to show that we did enter the war to save the Morgan loans! Whatever the merits of the historical proposition advanced by the three Socialists, it was so debatable that it was outrageous to send them to prison because twelve jurymen disagreed with their view.

In connection with the crimes we have now, embarrassments of the kind just described are sometimes unavoidable, but why multiply them many times by setting up an entirely new crime of inaccuracy, where truth will always be a principal issue and judges and juries will be constantly led into labyrinths of politics and economics?

There are still more objections to a criminal remedy. One is the ease of evasion by printing ingenious equivocations or producing a false impression through omitting material facts without actually saying anything untrue. Another is the number of violations which would have to be investigated. However, it is not necessary to elaborate further in order to make it clear why some different remedy for inaccuracy should be sought.

Something can be said for a milder legal device which would endeavor to correct errors without imposing any punishment. In the next chapter, I shall consider whether such a device might desirably be applied to inaccuracies in general.

<sup>3</sup> *Pierce v. United States*, 252 United States Reports 239 (1920). See FSUS, pp. 93-97.

## 8

# THE COMPULSORY CORRECTION OF ERRORS

### CLASSIFICATION OF POSSIBLE CORRECTIVE METHODS

**I**N THE course of discussing various kinds of falsehoods, I have several times mentioned the possibility that the law might provide a new and better remedy for counteracting them, which would merely try to correct errors without imposing damages or punishment upon the person responsible for these falsehoods. Such new methods have been chiefly urged in connection with libel and slander. The crude Anglo-Saxon notion of vindicating honor by getting cash has become unsatisfactory to many decent people. They want a less sordid and more convenient procedure, which will focus its attention on what most concerns them—the mistakes in the defendant's statement. It would be desirable for a court to be able to do something tangible to reduce the injurious effect of those mistakes, without having to bother about any of the hard-fought questions of damages which now take up so much time in a libel suit. The present libel action will remain for those who want to use it, but it ought not to be the sole remedy.

As yet the American law of libel has done little to escape from the procedural limitations which arose hundreds of years before newspapers existed, out of the exigencies of trial by jury and the fact that damages were the standard mode of redressing most wrongs. European law, on the other hand,

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made a clean break with the past during the period of the French Revolution and Napoleon, and, consequently, it displayed a great deal of resourcefulness in devising new remedies to meet new evils which were becoming prominent in the nineteenth century, including falsehoods in the press. The French and German legislation for the correction of errors may be worth imitating as a more civilized way of dealing with private libels; and it is conceivable also that the same principle can be extended so as to combat group libels and inaccuracies in general. Therefore, I shall inquire whether it is a good device for creating a motive toward truthfulness all down the line without involving the state in censorship.

Before seeing what we can learn from this foreign experience and from our own mild modifications of libel law, I find it helpful to describe and distinguish three methods for the correction of errors. None of these involves any damages or punishment because of the original publication of the misstatement.

1. *The right of reply*.—This remedy compels the defendant to publish the plaintiff's version of the facts, with a penalty for failure to do so. A newspaper will thus be obliged to give the plaintiff the opportunity to reply to an item in the press, but the paper is free to present this as coming from outside. The paper does not have to agree with the plaintiff's story but is free to persist in its original position. The effect is to give all readers both sides.

2. *Compulsory retraction*.—The defendant is ordered to adopt and publish as its own a revised version of the facts. This method forces the defendant to accept the plaintiff's story, or else be punished. Here we have true withdrawal or retraction. The paper admits that what it originally said is false or inaccurate. Sometimes a full corrected statement

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would be required. In other situations a mere apology would suffice. This remedy is obviously more drastic.

3. *Optional retraction.*—Without forcing the newspaper to issue a revised version of the facts, the court may conceivably give it the option of doing so. As an inducement to revise its original statement, the newspaper may be told that it will then incur a lighter penalty or even avoid penalties altogether. This is the only method which has yet been extensively used in the United States.

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*France.*—When French newspapers first attained any sort of liberty, which was not until after the restoration of the Bourbons, the demands during the debates for protecting citizens against abuses of the power of the press caused the insertion of provisions for the right of reply (*droit de réponse*) in the press legislation of 1822. After considerable modifications, the general idea was embodied in Articles 12 and 13 of the basic Press Code of 1881, which at last brought real freedom of the press to France. These articles are still in force.<sup>1</sup>

Before turning to the specific provisions, I should explain that the French Press Code differs from our law in one respect. We throw legal liability mainly on the corporation which owns the newspaper. The French law throws it on an individual called the *gérant*. Every journal must have a *gérant*, which I shall translate as “the responsible editor.” His name must be registered when the paper is started, he signs documents required by law, his name is printed on every

<sup>1</sup> My information on the French law is largely drawn from Barbier, *Code expliqué de la presse* (2d ed., 1911), Vol. I. This is cited herein as Barbier, but I have abstained from specific references, in order to avoid footnotes, so far as possible.

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issue, and he is sued for damages or punished for wrongs committed in the newspaper.

Of the two sections of the Press Code which concern us, Article 13 is the more important:

The responsible editor shall be required to insert within three days of their reception (or in the next issue if none be published within three days) the replies of every person named or designated in the journal of periodical publication under penalty of a fine of 50-500 francs [\$10-\$100 in the good old times], without prejudice to other penalties and damages to which the original printed item [*l'article*] may give rise. This insertion shall be made in the same place and in the same type as the item which has called forth the reply. The reply shall be printed without charge when it does not exceed twice the length of the item.<sup>2</sup> If the reply exceeds that amount, the charge for insertion shall cover only the surplus and shall be figured at the same rate as advertisements of legal proceedings.

Several significant points stand out:

a) As to substance, this is not a remedy for the correction of mistakes in general. Only a person named or reasonably indicated (*nommée ou désignée*) by the item has the right of replying to it. Therefore, this remedy is surely useless to stop talk of the Protocols of Zion sort; and it appears not to be available against group libels unless the group be a corporation or other legal entity. However, the mention of a commercial article is considered to designate its manufacturer and to give him the right of reply.

b) The right of reply is not confined to libels on individuals or other wrongful statements. It is in no way necessary that the original item be injurious, defamatory, malicious, or even mistaken. It is enough that it names or indicates the plaintiff. The highest French court has repeatedly declared: "The right

<sup>2</sup> If the article deals with several subjects, only the part which concerns the person who replies is the basis of measurement for the length of his reply (Barbier, p. 147).

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of reply is general and absolute. He who exercises it is sole judge of the form, the tenor, and the utility of his reply, and the insertion thereof cannot be refused [by the newspaper] except when it would be contrary to statutes or good morals, or to the legitimate interest of a third person or to the honor of the journalist himself."<sup>3</sup> In short, if the person named by the newspaper wants to reply, that is all there is to it.

c) The reply can be made to opinions as well as statements of fact. In this respect, the French law gives a wider remedy than the German law.

d) We now come to procedure. If the journal refuses to publish the reply, the person goes to a prosecuting official (*le ministère public*), who then brings the proceeding to collect the penalty. Suppose that no complaint is made, but the official thinks that pressure for a reply would serve the public interest. Can the official initiate the proceedings? No. If the person named by the journal decides, after reflection, that it is wise to let the whole affair sink into oblivion, the public official has no power to prolong the controversy.

The foregoing discussion shows that the French remedy was not meant to assert the public interest in truth but merely to protect the interests of individuals. On the one hand, the named individual may demand a reply without any showing of a mistake of fact or other falsehood; and his reply must be printed no matter how many errors it contains. On the other hand, if the named person remains inactive, a falsehood damaging to the public cannot be corrected by this method of compulsory publication of a reply. For example, if a newspaper exacerbates foreign relations by accusing a foreign ruler of violating the pledge of safe-conduct, only that ruler can demand the insertion of a corrective statement or bring

<sup>3</sup> I shall speak of these exceptions later. See below, pp. 150-52, 158, 193-94.

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pressure through the courts. If he is too busy with other matters, the newspaper can go on repeating the assertion without being forced to present the other side. In short, whatever Article 18 does to promote the truth is incidental, indirect, and somewhat haphazard.

e) Reverting to my distinction between retraction and reply, I find it clear that the French remedy, as its name indicates, is only reply. The journal is not forced to present the compulsory insertion as the correct account of the facts. Quite the contrary. After the journal has inserted the other fellow's story as the statute requires, the editor may, if he chooses, comment adversely on the reply. Apparently, he can do so in the same issue and in the same column. This gives the editor a considerable advantage over his victim, whose reply is separated by two or three days from the original reference to him. The editor can get in his blows much faster. Of course, if the editor comments on the reply, the victim can insert another reply to the comment three days later, for the right to defend persists as long as the provocation continues. Thus the readers get both sides, but they do not necessarily get the truth. We are thrown back on Milton's remedy of deriving truth out of a contest. The French law is not a method of getting away from Milton. The law, as usual, can help us toward the truth, but cannot hand it to us on a silver platter.

f) The apparent simplicity of the French statute is surprisingly deceptive. Its twelve lines of type have given rise to numerous questions of interpretations, which require twenty-four pages of discussion in Barbier's treatise. Here are a few of the questions which have come before the French courts:

Although the journal may refuse a reply containing indecencies, is the editor criminally liable if he does print such a reply? Yes, for otherwise licentious journals would collude

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with people by intentionally naming them for the sake of getting obscene communications. This puts the editor between the devil and the deep sea. A reply comes in which *may* be indecent, but obscenity is often an arguable matter, as the case of *Strange Fruit* shows. If the editor rejects the reply, the court may deny any indecency and penalize him for not printing it. If he does print it, the court may find it indecent and put him in jail for obscenity.

Similarly, he need not insert a reply which libels a third person or merely hurts his feelings, but who is a third person? Suppose the reply reflects on another editor of the same journal. Furthermore, although the highest French court allows the journalist to refuse a reply which is contrary to his honor, when is this so? The vivacity of the reply can be excused by the vivacity of the attack.

May the editor reject the reply because it is full of inaccuracies? No. And he has to print it even if it be ungrammatical, which must be much harder on a French editor. The editor can neither add nor subtract nor modify. He must either print the reply as it stands or find a lawful reason for rejecting it altogether.

Especial difficulties are created by long book reviews and scientific articles. A magazine might well be staggered by the expense of printing an author's reply twice as long as the hostile review of his book, but there is no way out.

Probably two kinds of people avail themselves of the French statute—persons who have real cause to seek justification and cranks. What happens when a crank who was named by a journal runs to great length according to his custom and insists on the publication of his formless illogical answer? Of course, he has to pay advertising rates for the surplus, but he is glad to do so for the pleasure of seeing his stuff in type,



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especially as no journal has ever voluntarily published any of his outpourings. Length is no ground for rejection any more than bad style. Suppose his reply fills four columns and crowds out today's *causerie* and yesterday's *cause célèbre*. There does come a point when the judges will sanction the rejection of what hampers the functioning of the newspaper, but some queer stuff must have to be swallowed by the editor before he can persuade the court to protect him.

Although all these difficulties of interpretation should be carefully considered by an American state legislature before the French remedy be adopted, many of them could be easily obviated by added statutory provisions which will be suggested later.

An accompanying article of the French Press Code (12) relates to demands for correction which emanate from officials:

The responsible editor shall be required to insert gratuitously, at the head of the next issue of the journal or periodical writing, all the corrections (*rectifications*) which shall be presented to him by a person exercising public authority, on the subject of his official acts (*actes de sa fonction*) which have been inaccurately reported in the said journal or periodical writing. All these corrections shall not exceed twice the length of the article to which they reply. In case of refusal, the responsible editor shall be punished by a fine of 100-1,000 francs [\$20-\$200 before 1914].

It will be observed that Article 12 does not apply to all press statements concerning an official, but only to those about some act which was performed in his public character, as part of his official duties. Examples would be the garbling of a court decree or of the latest ruling of the rationing authorities. If, however, a newspaper asserts that an official has been spending the week end visiting a wealthy man who is under investigation by himself, then he cannot take ad-

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vantage of Article 12, because the statements concern his nonofficial behavior. Like any private citizen, he must vindicate himself by inserting a reply under Article 13 or by bringing a regular libel suit.

Evidently, the remedy of *rectification* under Article 12 comes close to retraction because it forces the journal to publish the corrective matter as an authentic document and not merely as the views of the other side, although I suppose that the editor is left free to comment on the *rectification* if he still differs from the official position. The French remedy resembles what our judges accomplish through threats of contempt of court, when they compel a newspaper to re-write an erroneous account of a judicial decision. However, the French practice is much broader in that it may be invoked by administrative and executive officials as well as by judges. In view of the growing importance of administrative regulations for American life, we might well consider the French method for assuring their publication by the press in accurate form.

In addition to these articles of the Press Code, there is another remedy, the *amende honorable*, for defamation which injures the plaintiff's personal honor, as distinguished from his pocketbook. Instead of salving the wound to a man's honor by heavy damages, like our law of libel, the French law attempts to satisfy him by a symbolic act in which money counts for little or nothing. Such reparation may be compared to an honest apology made in private life by a person who has offended the sensibilities of an associate. The theory is that only injuries to a man's property and purse are measurable in money. These can be redressed by putting money into his purse; but the proper atonement for attacks on his personal dignity consists of acts which pay respect to his dignity. This idea was deeply rooted in many countries which derived their

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law from Rome. For example, in the Union of South Africa apologies in open court were formerly required, sometimes under humiliating circumstances; but now the courts would probably order a written apology.<sup>4</sup>

The remedy of a public apology was not unknown in England, because the ecclesiastical courts were influenced by canon law (the law of the Catholic church), which went back to Roman law. During the days when these courts still had power outside church matters, they dealt with slander and sometimes ordered honorable amends. As late as 1847 a Cambridge fiddler, who had said unkind things in an alehouse about the chastity of his rector's wife, was sentenced by a famous ecclesiastical judge to be canonically corrected and punished by appearing in the vestry-room of the church after service in the presence of the dame and five or six of her friends, where "with audible voice" he was humbly to confess his offense in prescribed words and ask forgiveness. Unfortunately for the court of justice, the fiddler had gained the affection of Cambridge students by playing at their dances. The students thronged the church on the appointed day, interrupted the service, cheered the "penitent" slanderer when he entered clothed in a white sheet with a candle in his hand, and finally carried him off in triumph to an alehouse to drink confusion to the parson, so that the required apology was never spoken.<sup>5</sup>

The French law of honorable amends was less ambitious. Sometimes a small token payment of money was awarded, but the chief method used is to condemn the defendant found

<sup>4</sup> De Villiers, *The Roman and Roman-Dutch Law of Injuries* (1899), pp. 177-79.

<sup>5</sup> Witt, *Life in the Law* (1906), pp. 4-9. For the use of public apologies in Colonial Massachusetts see *Records of the Suffolk County Court, 1671-1680* (Colonial Society of Massachusetts, 1933), I, lxxxv.

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guilty of libel to publish the text of the judgment in a specified place at his own expense. A French writer observes: "In the case of defamation . . . the publicity of the judgment of condemnation will be often the most natural, as well as the most efficacious of indemnities."<sup>6</sup> When a newspaper is found guilty of libel, the judgment would doubtless be ordered published in that newspaper. Moreover, as I understand the French writers, this journal might also be required to pay for the insertion of its defeat in other newspapers as well. Imagine the effect on the *Chicago Tribune* of being obliged to pay the *Chicago Sun* to print a formal condemnation of the *Tribune* for libel.

Sometimes a defamed Frenchman will turn aside from the ordinary courts and seek justification before a jury of honor, which is apparently selected by the parties to the dispute or their friends. This device probably arose out of old dueling practices. An apology in the presence of the friends of the contestants served as a substitute for a duel.<sup>7</sup>

Interesting as these various methods of honorable amends are, none of them seems worth adoption in this country. Juries of honor would probably not work well in our law.<sup>8</sup> There is a little more to be said in favor of the compulsory publication of adverse libel judgments. The remedy would be easy to administer, and it would break the silence in the press which now often surrounds libel actions against newspapers.

<sup>6</sup> Garraud, *Droit pénal français* (1914), Vol. II, sec. 660. See also Carpentier, *Répertoire général alphabétique du droit français* (1887), sub "Affiche," pars. 351 ff.

<sup>7</sup> See Riesman, 42 *Columbia Law Review* at 1111 (1942); and the item in the *New York Times*, December 23, 1923 (p. 2, col. 5), telling how a jury of honor was used instead of a duel to settle a quarrel between Herriot and a newspaper publisher.

<sup>8</sup> Pritt, "Freedom of Discussion and the Law of Libel," 6 *Political Quarterly* 173 at 188 (1935).

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But would it really do much good? This humiliating action by the defendant newspaper might not have the desired effect of arousing widespread condemnation of its disregard of truth. Instead people might think it was like hitting a man when he was down. Furthermore, the public would learn little about the truthfulness of the original newspaper article by reading the published verdict in the ensuing libel suit. They would merely find out that the plaintiff had won so many dollars. Since the issues of falsity and fault are always tangled up together in a libel action for damages, there would be no means of knowing which issue mainly influenced the outcome. A libel verdict never reviews the basic facts in detail or declares what particular statements in the article were inaccurate. No doubt, it would be enlightening to the public if a court were willing to go to the trouble of writing out such a lengthy report and ordering it printed. Some plaintiffs might then be glad to abandon any claims for damages in order to get judicial vindication of their good names. The trouble is that this is a job for the Recording Angel and not for judges. Courts are very busy places. The judges who sit in private litigation have all they can do in handling cases where a decision one way or the other will have disagreeable consequences to somebody, by obliging him to give up money or property. They act under a very grave sense of responsibility, which is entirely different from the historian's responsibility to determine truth as to past happenings. Therefore, the only judgments which an inaccurate newspaper would be ordered to publish by way of *amende honorable* would be the old-fashioned awards of damages, and such a practice does not offer enough advantages to offset its novelty and bother.

The foregoing consideration of the French law shows that the right of private reply (Article 13 of the Press Code) offers

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the best model for American imitation. Nevertheless, we must not expect too much of that remedy. In very bad situations where bitter group strife displays itself in constant falsehoods, the *droit de réponse* breaks down as much as more conventional remedies. In France before the war, when Fascists, Communists, and unlucky moderates were getting bespattered in the press, every libel suit for damages became a courtroom circus. Juries could easily be swayed by irrelevant appeals, and jurors were often afraid of being attacked in the defendant's journal. French juries, like ours, did not take very seriously charges against politicians of any stripe and were particularly hostile to suits by politicians in power. And, as Riesman shows,<sup>9</sup> the *droit de réponse* became just as farcical:

"It might have been thought that this device would mitigate whatever evils lay in the system of libel trials by jury. For litigation inevitably puts the plaintiff in the light of a golddigger or of a vindictive person, while the defeated defendant can claim the role of martyr. Resort to the right of reply, on the other hand, refutes any imputation of commercial or punitive motives. And the reply puts the dispute before the public while it is hot, rather than permitting a limited post mortem before a judge and jury. Moreover, the plan seems sensible not only because it facilitates an 'instant reply' to propaganda and thus prevents monopolization of communication, but also because the possibility of a reply is an effective deterrent to a newspaper which cares at all about its reputation for veracity. Nevertheless, French lawyers generally termed the *droit de réponse* illusory. The right was limited to 'persons,' and therefore one newspaper could not make use of it when libeled by another newspaper—an important omission in view of the large proportion of these political

<sup>9</sup> 42 Columbia Law Review at 1114-16.

suits which, in all the countries examined, were fought out between newspapers and their editors as representatives of the opposing social forces. Nor could a member of a group make use of the *droit de réponse* unless he had been expressly designated in the offending article. The courts refused to extend the right to pamphlets and to the radio. In the radio case the French court reasoned that radio addresses are variously reported and that it would be hard to discover who had spoken the offending words. Other legal limitations of the *droit de réponse* led to frequent litigation by those seeking to enforce the right against newspapers which had refused to permit a reply."

The specific cases described by Riesman show how plaintiffs took advantage of the law by submitting replies which abused the newspaper editors and their political associates. The courts were constantly considering whether phrases like "abominable lie" were excused by the vituperative style of the original article. Thus libels spawned libels, and the time of the French courts was occupied by studies in comparative mud-slinging.

*Germany.*—The right to correct (*Berichtigung*) given by section 11 of the Press Law of 1874 is really not retraction but right of reply, as in the French law from which the Germans derived their remedy. It corresponds to the French statute except for these differences: (a) There is no right to reply to opinions but only to statements of fact. (b) The German statute embraces both public authorities and private persons, thus telescoping the remedies covered by Articles 12 and 13 in the French Code. (c) In the German law it seems enough that the person is affected (*betheiligten*) by the original article, whereas in the French law he must be named or indicated; this may give a wider relief to a member of a defamed group.

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(d) The reply must be printed in the next issue after the request, whereas the French law allows a leeway of three days.

(e) The reply ceases to be free of charge after it exceeds the length of the original item, whereas in France it can run twice the length gratuitously.

I have not investigated the judicial interpretation of the German statute. It is clear that the newspaper can say in a note to the reply that it maintains its previous position and gives its reasons; but if it adds new facts, it can be forced to insert a second reply.

The remedy of honorable amends by enforcing publication of the judgment also exists in Germany.<sup>10</sup>

In the stormy period before Hitler became chancellor, these German remedies proved as unsuccessful as the French remedies during a comparable crisis. Riesman says:

“Restrictive judicial interpretation hampered the effectiveness of this intelligent method [*Berichtigung*] of dealing with the problem. The courts held that the civil courts were not available to assist a person seeking rectification; he could not recover damages, unless he could show actual loss, as a result of the refusal to publish his reply. And criminal proceedings were inadequate, not only because the responsible editor would usually turn out to possess parliamentary immunity, but also because the maximum fine was 150 marks.

“The provisions for publication of a judgment against the defendant in a libel case are analogous to the right of correction in their objectives. They require the defendant, if the person defamed so requests, to publish the decision in the litigation at his own expense. The statute, however, did not clearly define the method by which this was to be done, leav-

<sup>10</sup> See Schuster, *Principles of German Civil Law* (1907), sec. 298; Riesman, *op. cit.*, below, n. 11.



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ing enforcement of details to the courts. As a consequence, the publication which was required during the Weimar period was generally cursory, and was insufficient to counterbalance the defamatory article and the usual comment on the case itself."<sup>11</sup>

The following account by Goebbels of the fruitlessness of legal efforts to combat "Jewish" defamation was, Riesman thinks, actually a description of the ingenuities of Nazi newspapers in rendering the right of reply unworkable:

"In some Berlin paper such a lie appears and makes then its rounds in hundreds of dependent provincial papers. Each provincial paper adds its own commentary, and once one starts with 'rectifying' one never reaches the end. . . . As soon as one false story has been rectified, another one is published. . . . Such a suit lasts then generally half a year and longer. In the meantime the public has forgotten the subject of the case; the Jewish pen scoundrel simply says before the court that he was the victim of an error, and usually gets away with a fine of 50 to 70 marks, a sum which is readily reimbursed to him by the publishers. . . . [From] the newspaper . . . report on the case . . . the ignorant reader must gather that the Jewish liar is definitely right, since there must be some truth in the defamation as can be also clearly seen from the lenient penalty."

When a country is on the verge of a civil war, libel laws will do no good. Unless the antagonisms can be lessened by drastic economic and social reforms, it is time to call out the troops.

*England and the United States.*—The common-law countries have thus far dealt characteristically with the problem of reply and retraction. Instead of conferring on a court the power to issue an affirmative order for compulsory insertion, as the

<sup>11</sup> 42 Columbia Law Review at 1110-11 (1942).

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French and German laws did, English and American statutes merely took the existing jury action for damages and reshaped it slightly. The journal's conduct in retracting or refusing to do so was made a factor affecting the amount of the damages which a jury might properly award. The practical effect of this device of optional retraction was to increase somewhat the control which is exercised over the size of verdicts by the judges who try libel cases or hear them on appeal.

The English legislation goes back to Lord Campbell's Libel Act of 1843, which allowed a newspaper to plead in reduction of damages that it had published a full apology for its misstatements. Two years later Parliament required the plea to be accompanied by a payment of money into court by way of amends. The defense was so hedged around with burdensome conditions that it did not work well. A leading English writer declared in 1908 that it "is now quite useless, and worse than useless," although a defendant as late as 1904 was "foolish enough to resort to its provisions."<sup>12</sup> The newspaper loses all the money it paid into court, even if it wins the case. On the other hand, if the jury learns the amount paid into court, as is likely, this knowledge may prejudice the jury against the newspaper. The jury may think: "The editor admits fault and then offers a pittance; we'll show that fellow what real money is."

Probably these English statutes of the 1840's influenced American legislation. The idea of paying money into court had no attractions for American newspapers and completely disappeared in mid-Atlantic, but the device of connecting retraction with the award of damages for libel has been widely copied in this country. The following twenty states now have

<sup>12</sup> Bower, *Code of the Law of Actionable Defamation* (1908), p. 228. For fuller treatment see *Odgers on Libel and Slander* (5th ed., 1911), *passim*.

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statutes giving the optional remedy: Alabama, California, Connecticut, Florida, Georgia, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, North Dakota, Ohio, Utah, Virginia, West Virginia, and Wisconsin.<sup>13</sup> In addition, Kansas formerly had such a statute, which was declared unconstitutional.<sup>14</sup> Nevada has a very different statute on the French model, to be quoted later.<sup>15</sup>

The American statutes are not the result of a single legislative wave. Chronologically, they appear to fall into three main

<sup>13</sup> *Alabama Code* (1940), Title 7, secs. 913-16; *California Civil Code* (Deering, 1941), sec. 48a; *Connecticut General Statutes* (1930), sec. 5668; *Florida Statutes* (1941), sec. 770.02; *Georgia Code Annotated* (Park et al., Supplement, 1945), sec. 105-713; *Indiana Annotated Statutes* (Burns, 1933), sec. 2-1043; *Iowa Code* (Faville, 1946), secs. 659.2-659.4; *Kentucky Revised Statutes* (Cullen, 1944), sec. 411.050; *Maine Revised Statutes* (1944), c. 100, sec. 48; *Massachusetts Annotated Laws* (Supplement, 1945), c. 231, sec. 93; *Michigan Statutes Annotated* (Henderson, 1938), sec. 27.1373, superseding *Michigan Laws* (1885), No. 233, p. 353; *Minnesota Statutes* (Henderson, 1945), sec. 548.06, superseding *Minnesota Laws* (1887), c. 191; *New Jersey Statutes Annotated* (1939), sec. 2:59-2; *North Carolina General Statutes* (Michie et al., 1943), secs. 99-1-99-3; *North Dakota Revised Code* (1943), sec. 14-0208; *Ohio General Code Annotated* (Page, 1938), sec. 11343; *Utah Code Annotated* (1943), sec. 62-2-1; *Virginia Code* (Michie et al., 1942), secs. 6240, 6240(a); *West Virginia Code* (Michie et al., 1943), sec. 5725; *Wisconsin Laws 1945*, c. 262, *Wisconsin Statutes* (Brossard, 1945), sec. 331.05, superseding *Wisconsin Statutes* (Brossard, 1941), sec. 331.05.

For discussion of these statutes see Arthur and Crosman, *The Law of Newspapers* (2d ed., 1940), pp. 240-48 (Appendix C collects statutes); Morris, "Inadvertent Newspaper Libel and Retraction," 32 *Illinois Law Review* 36, 41-45 (1937) (excellent); Rothenberg, "Damages for Libel in the United States and on the European Continent," 24 *Journal of Comparative Legislation and International Law* (3d ser.) 6 (1942) (incomplete survey); Waybright, "Defamation by Newspaper and Radio: Are the Florida Statutes Constitutional?" 14 *Florida Law Journal* 161 (1940) (examines cases in several states); Legislation, 43 *Harvard Law Review* 126 (1929); Notes, 35 *Harvard Law Review* 867 (1922); 13 *American Law Reports* 794, 799 (1921).

<sup>14</sup> *Kansas General Statutes* (1901), secs. 3920, 3921.

<sup>15</sup> *Nevada Compiled Laws* (Hillyer, 1929), sec. 10506. See below, p. 171.

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periods. Before the Civil War, Alabama and Virginia passed simple statutes under the influence of the British Libel Act of 1843. Most of the legislation was adopted between 1885 and 1910, presumably because of the great growth of commercial journalism at this time. Since 1930 a few more states have dealt with the matter, for example, California, Florida, and Georgia. It is significant that no such statutes exist in several states having great metropolitan newspapers, e.g., Illinois, Missouri, New York, and Pennsylvania.

Although these statutes vary a great deal in phraseology, they tend to fall into two groups, depending on the extent to which the plaintiff's damages are cut down by the publication of a satisfactory retraction or by his failure to seek a retraction before going to court. I call these the "mild" statutes and the "drastic" statutes. In order to understand the distinction, the reader must recall what was said during the discussion of libel about three kinds of damages being recoverable at common law: (1) *special damages*, for an actual pecuniary loss like getting discharged; (2) *general damages*, for injury to reputation; and (3) *punitive damages*, which give the plaintiff more than he has lost in order to punish a bad defendant.

The mild type of statute uses the remedy of retraction to cut off only punitive damages, leaving the victim free to recover general damages and special damages. The drastic type cuts off general damages as well, leaving the victim with nothing but his retraction and whatever special damages he is able to prove by objective evidence.

The mild type is much the commoner. It is exemplified by the Kentucky statute, which was enacted in 1910:

In any civil action for libel, charging the publication of an erroneous statement alleged to be libelous, it shall be relevant and competent evidence for either party to prove that the plaintiff requested retraction or omitted to request retraction.

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The defendant may allege and give proof that the matter alleged to have been published and to be libelous was published without malice, and that the defendant in the next regular issue of the newspaper or publication, after receiving demand in writing or within seven days if no such demand was made, did correct and retract the statement, or in the next regular issue of the newspaper or publication did publish a sufficient correction, retraction or explanation as conspicuously and publicly as that in which the alleged libelous statement was published, in the same type and in the same place in at least two successive issues of the same periodical publication, accompanied by editorials in which the allegedly libelous statement was specifically repudiated.

Upon proof of such facts, the plaintiff shall not be entitled to punitive damages, and the defendant shall be liable only to pay actual damages. The defendant may plead the publication of the correction, retraction or explanation in mitigation of damages.<sup>16</sup>

The phrase "actual damages," used in this and several other statutes to show what retraction does not cut down, is judicially construed to include both special and general damages. Thus interpreted, the mild statutes do little more than declare the common law. Without any legislation at all, the publication of an honest retraction would be a strong evidence of good faith negating the right to punitive damages and even reducing general damages if the jury so desired; and, conversely, the refusal to retract on request would lay the journal open to pay "smart money."<sup>17</sup>

Some statutes add a provision that the plaintiff "in any libel action" must, before starting suit, serve a written notice on the newspaper publisher specifying the statements which are considered defamatory. This notice is in effect a request for retraction, which gives the journal an opportunity to correct the libel and thus avoid punitive damages. But suppose

<sup>16</sup> *Kentucky Revised Statutes* (Cullen, 1944), sec. 411.050; *Reid v. Nichols* 166 Kentucky Reports 423 (1915); Note, 32 Kentucky Law Journal 344 at 351-52 (1944). The requirement of editorials is unusual.

<sup>17</sup> See Note, 13 American Law Reports Annotated 794 (1921).

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that the plaintiff never files any notice. Although the statute seems to say that this failure bars *all* damages, the courts have usually emasculated the act by holding that the plaintiff can still recover general and special damages. In short, the conduct of both parties with respect to retraction has no effect except upon punitive damages. Whether or not the plaintiff requests retraction, and whether or not the journal publishes a proper retraction, a person who thinks himself libeled can go ahead and collect, not only special damages, but also whatever compensation the jury chooses to award for his smirched reputation.

The best writer on this subject, Professor Clarence Morris of Texas Law School, says of these "mangled statutes" that "the sum total of significant changes in the measure of damages when inadvertent libel has been retracted is zero."<sup>18</sup> They seem especially ineffective in states like Massachusetts, where punitive damages are always forbidden, even without a retraction. On the other hand, some Kentucky newspapermen say that their statute has helped bring about a practice of ready retraction whenever an error is pointed out. Also, though these mild statutes do not actually alter the common-law rules of damages, they may do some good by directing the attention of juries and judges to the importance of retraction or its refusal as a factor in determining the amount of recovery.

Contrast the drastic type of statute, which limits the plaintiff to special damages unless he demands a retraction, and also permits the publication of a retraction to bar general damages for an honest mistake. This is exemplified by legislation in Minnesota:

<sup>18</sup> "Inadvertent Newspaper Libel and Retraction," 32 Illinois Law Review 36 at 42 (1937).

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In an action for damages for the publication of a libel in a newspaper, the plaintiff shall recover no more than special damages, unless a retraction be demanded and refused as hereinafter provided. He shall serve upon the publisher at the principal place of publication, a notice, specifying the statements claimed to be libelous, and requesting that the same be withdrawn. If a retraction thereof be not published on the same page and in the same type and the statement headed in 18 point type or larger "RETRACTION," as were the statements complained of, in a regular issue thereof published within one week after such service, he may allege such notice, demand, and failure to retract in his complaint and recover both special and general damages, if his cause of action be maintained. If such retraction be so published, he may still recover general damages, unless the defendant shall show that the libelous publication was made in good faith and under a mistake as to the facts. If the plaintiff was a candidate for office at the time of the libelous publication, no retractions shall be available unless published on the same page and in the same type and the statement headed in 18 point type or larger "RETRACTION," as were the statements complained of, in a regular issue thereof published within one week after such service and in a conspicuous place on the editorial page, nor if the libel was published within one week next before the election. This section shall not apply to any libel imputing unchastity to a woman.<sup>19</sup>

Notice the special provisions about libels of candidates and women. These also appear in some statutes of either type in other states.

Here is a law with teeth in it. If we want to encourage correction through the pressure of apprehended damages, instead of making it compulsory as in France, the Minnesota law appears to offer a good model. Yet there are three reasons why I am reluctant to urge the general adoption of the drastic Minnesota type of statute in states which have the mild type or no legislation at all.

First, the constitutionality of the drastic type is doubtful. It is true that the Minnesota legislation is valid in that state

<sup>19</sup> *Minnesota Statutes* (Henderson, 1945), sec. 548.06.

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by virtue of a splendid opinion by Judge Mitchell.<sup>20</sup> But former statutes of the same sort were invalidated in Kansas and Michigan<sup>21</sup> and probably in Ohio.<sup>22</sup> These decisions held that such a statute violated state constitutional provisions entitling men to a remedy by an injury to liberty, property, etc., because it cut off compensation for grave harms to reputation which would not be removed by retractions. Although I agree with Judge Mitchell and consider the reasoning of the opposing decisions to be outmoded, the fact remains that they not only stand unshaken in their own states but also have had much influence on other courts.<sup>23</sup> Consequently, a new drastic statute would confront a powerful cannonade from bench and bar.

Secondly, the drastic statute may be unwise. It is doubtful whether it is fair to make a published retraction the sole remedy for general injury to reputation even as against an honest newspaper. Special damages and nothing more seem an inadequate compensation for an unfounded charge of crime, which was read by thousands who never happen to see the subsequent retraction. Consequently, Professor Morris, though by no means satisfied with the common law, condemns the drastic statutes:

"If a plaintiff must show special damages (that is, pecuniary injury through loss of a particular contract or job) recovery in libel suits would be rare. Not often can the damage flowing from libel be easily traced, so not often can special

<sup>20</sup> *Allen v. Pioneer-Press Co.*, 40 Minnesota Reports 117 (1889).

<sup>21</sup> *Hanson v. Krehbiel*, 68 Kansas Reports 670 (1904); *Park v. Detroit Free Press Co.*, 72 Michigan Reports 560 (1888).

<sup>22</sup> *Byers v. Meridian Printing Co.*, 84 Ohio State Reports 408 (1911); see also *Post Pub. Co. v. Butler*, 137 Federal Reporter 723 (C.C.A. 6th, 1905). Yet the Ohio law still stands in the statute-books.

<sup>23</sup> See, e.g., *Neafe v. Hoboken Printing and Pub. Co.*, 75 New Jersey Law Reports 564 (Court of Errors and Appeals, 1907).



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damages be proved. But the plaintiff who cannot specifically demonstrate loss may have suffered sharply. The victim may never hear of business opportunities which would have knocked at his door but for the libelous stain on his name plate. Pecuniary damage occurring between the time of the publication of the libel and the publication of retraction may be too subtle to be marshalled in evidence. A reputation is not like an inner tube which can be tested for leaks by submersion in water. . . . To require proof of special damages would mean virtual abolition of legal responsibility for inadvertent newspaper libel. Newspaper slips are usually the result of reprehensible conduct of members of the defendant's organization. To deny plaintiffs recovery for retracted libel unless they prove special damages, is to do away with newspapers' financial interest in accuracy. The tendency towards flamboyance and haste in modern journalism should be checked rather than countenanced. If newspapers could atone legally for their mistakes merely by publishing corrections, the number of mistakes might increase alarmingly."<sup>24</sup>

Morris prefers to improve the existing situation by reshaping the trial judge's charge to the jury so as to make damages cover more satisfactorily what he regards as the three main purposes of a libel action today: (a) to compensate the victim for tangible losses, (b) to clear his reputation in the eyes of the community, and (c) to make the journalists think twice before they repeat their reckless inaccuracy. This reform can be accomplished without any legislation if judges can be made to see more clearly what libel law is really trying to accomplish. There is considerable merit in this proposal, but it raises technical problems unsuited for discussion in this book.

Thirdly, I cannot find out enough about the practical oper-

<sup>24</sup> 32 Illinois Law Review at 44-45.

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ation of these optional restriction statutes, of either type, to warrant a decisive opinion for or against them. There are a few cases showing these statutes in operation, but it looks to me as if a considerable amount of libel litigation in the states having these statutes goes ahead just as if the legislation did not exist. It is significant that Arthur and Crosman in their textbook written for use in schools of journalism and newspaper offices devote seven pages to the general subject of retraction, and yet they do not say anything about the desirability of the statutes or indicate that proper newspaper practice is essentially affected by them one way or the other.

The most important point about all this American legislation is that it does not bear much on the need which was stressed at the outset of this chapter—to get a remedy for errors which will avoid the disadvantages of disputing over cash. It matters little in this connection whether the victim of a libel who wants to claim damages will be more satisfactorily handled under these statutes than at common law. We are chiefly interested in the plight of decent people who feel a strong desire to correct glaring misstatements in the press and yet hate the thought of bringing lawsuits to get money. The French and German law would give them just the kind of remedy they desire. The American statutes already considered do not help them because such statutes do not operate unless a money action is brought, or at least threatened; and this is repugnant to persons whose main object is to promote accuracy and vindicate their reputations as fast as possible.

The innocuous desuetude of the American statutes arises, I suspect, from their lack of correspondence with any common practical situations. The people who like to bring libel suits do not make much use of the statutes because they are eager for money and not retraction. The people who do want re-

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traction usually get it from decent newspapers on request, without needing the statutes; and, when they are faced with the kind of journal which refuses to retract, they are reluctant to employ the only pressure which the statutes supply, namely, a prospective libel action for money. This is the very thing such people are anxious to avoid. In short, this statutory remedy is really a modified libel suit and not the alternative for libel suits which we are seeking.

Furthermore, whatever the actual motives of legislators at the time of enactment, courts have constantly treated these statutes as promoted by newspapers for their own benefit in order to protect themselves from big libel verdicts. There is no evidence that the statutes were drafted by critics of the press in the hope of making newspapers more accurate. And it would be hard to demonstrate that newspapers in the states possessing such legislation are more truthful than those in other states. Minnesota, after forty years under the most drastic of these laws, nevertheless found itself so pestered with scandalous newspapers that the authorities tried to sweep them out of existence with injunctions.<sup>25</sup> Apparently they considered the optional retraction statute useless against deliberate lying.

Therefore, not much can be said for any statute which stops short with optional retraction. If legislation is to solve our problem of finding an alternative for libel actions and making newspapers better instrumentalities of truth, we must look for something like the French and-German laws which will enable a court to order the appropriate corrections to be made, without imposing damages or other penalties so long as its order is obeyed.

<sup>25</sup> *Near v. Minnesota*, 283 United States Reports 697 (1931); see FSUS, pp. 375-81.

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Before considering the desirability of such remedies, I want to point out two relevant items in the present law in this country:

First, Nevada (alone of all the states) has a statute establishing the right of reply.<sup>26</sup> The person named or otherwise identifiably designated must submit his reply within a week after the original publication in a daily newspaper (and within thirty days in case of other periodicals). The reply is usually to be printed in the next issue after receipt. It shall be given "a like position and space and as much display as the statement which provoked it." The reply must be published free unless it runs beyond the length of the original article, and then regular advertising rates can be collected in advance for the excess. Failure to print the reply carries maximum penalties of a thousand-dollar fine and six months in jail. I cannot find that this statute has been applied or construed.

Second, it was held in Massachusetts that a court sitting without a jury will not issue a mandatory injunction to compel a newspaper to publish a retraction.<sup>27</sup> Apparently what was sought was not merely the insertion of a reply, as in France and Germany. After pointing out that an injunction will not lie to prevent the publication of a false statement, Judge Braley assumed that the same principle would apply to a court order requiring a true statement and said: "The remedy is by an action at law for damages." Accordingly, the plaintiff amended his complaint so as to claim damages and nothing more. Although Massachusetts courts are now somewhat more willing to forbid libels of an outrageous sort,<sup>28</sup> the

<sup>26</sup> *Nevada Compiled Laws* (Hillyer, 1929), sec. 10506. This was enacted in 1911.

<sup>27</sup> *Finnish Temperance Society v. Riivaaja Pub. Co.*, 219 Massachusetts Reports 28 (1914).

<sup>28</sup> *Menard v. Houle*, 298 Massachusetts Reports 546 (1937).

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case about retractions has never been overruled. Since courts often base their refusal of injunctions in libel cases on the constitutional right of free speech, it is doubtful whether even a statute could make compulsory retraction valid. The Massachusetts court has gone so far as to upset a statute compelling a newspaper to publish at regular advertising rates the findings of a state board that an employer has violated the minimum wage law.<sup>29</sup>

Whatever the merits of this decision, it may very well be a serious invasion of liberty of the press to compel a newspaper to publish as true what the editor believes to be false. And that is what a retraction is, if the editor persists in thinking this supposed libel was correct. On the other hand, a statute compelling the insertion of the plaintiff's reply for what it is worth seems free from constitutional objections, so long as the newspaper is not subjected to a burdensome sacrifice of space or expense. Hence I assume that the French statute or the Nevada statute would probably be held valid in our courts.

### CONCLUSIONS AS TO THE DESIRABILITY OF NEW LEGAL METHODS

I shall develop these conclusions by asking a series of questions:

1. *What purposes do we hope to accomplish by a new legal remedy for libels and possibly for other misstatements?*—Two purposes stand out, the first being more important.

a) *To make newspapers and other kinds of mass communication serve as better instrumentalities for the attainment and spread of truth on matters which are important in the kind of society we desire.*—It will be noticed that I do not say that the purpose of the conceivable remedy is to ascertain the truth or to

<sup>29</sup> *Commonwealth v. Boston Transcript Co.*, 249 Massachusetts Reports 477 (1924).

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make sure that the truth is printed. Litigation can settle disputes; it cannot settle truth. The law makes a just decision probable by safeguarding the investigation in various ways, but legal action depends on the view of some tribunal (jury or court) as to what happened, and this view may differ from what actually did happen. In libel suits for damages it is worth while to run this risk of mistakes by the tribunal, because the alternative would be fights and many outrageous injuries to the reputations of honest men. On the other hand, the discussion of the use of criminal prosecutions to check inaccuracies in general showed that the gain from occasionally discouraging liars was outweighed by the great difficulties and uncertainties of deciding whether there was falsehood or not, especially in cases turning largely on questions of interpretation. We must always be careful not to assume that the findings of a tribunal on a controversial issue are **THE TRUTH**.

Yet, although we cannot make truth certain, we can render its attainment more probable. I think of at least three conceivable ways in which this ideal can be promoted through changes and improvements in the practice of the press. First, if the newspaper editor and the person directly concerned in a reported transaction consider the event together and can honestly agree as to what happened, the public will gain from reading their joint findings, which modify the previous and more hasty version of the same transaction. (This is one type of retraction.) Second, if these two persons continue to disagree, it will be helpful if both sides of the story can be rendered available to the community, which can then form its own judgment more satisfactorily. (This is the function of a reply.)<sup>30</sup> Third, the newspaper can be encouraged to be more

<sup>30</sup> For the last twenty years at least, I am reliably informed, there has been a more or less general practice on the part of reputable newspapers in

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careful about its original statements and more willing to investigate their accuracy afterward whenever objections have been raised. (Any sort of legal remedy—the old-fashioned libel action or some new device—is likely to have such an admonitory effect.)

Now, it is obvious that law is not the only force which can impel editors along these three paths which will bring us nearer to the truth. Persuasion, public opinion, and a sense of decency may also encourage the correction of mistakes, the presentation of the other side, and a greater general eagerness to be accurate. My own feeling is that these extra-legal influences will have much more effect than legal compulsion. Indeed, one of the main values of law is that it crystallizes existing standards of conduct and makes more people aware of those standards, so that compliance becomes habitual. In the field of torts a good law may render itself almost superfluous. Just because it is good, it hardly ever needs to be invoked in litigation.

On the other hand, a new legal device is sometimes open to the objection that it weakens existing nonlegal influences. People concentrate their attention on what the law specifies rather than on their previous notions of decent behavior. They may be content with mere obedience to the new law and

New York City to give a person, who is the subject of an attack by another in an article which the paper feels it must publish because of its news value, an opportunity to reply not only at a later date but *in the article itself*. This is due partly to considerations of fairness, partly to the fact that it is good newspaper practice, but also partly to the defensive possibilities. For example, Doe makes an attack on Roe at a press conference. The reporter telephones Roe, tells him about the attack, and asks him if he wishes to comment. If the invitation is accepted and Roe's comment on the attack is published, the newspaper may plead consent should Roe later sue it for libel. See Judge Martin in *Schoepflin v. Coffey*, 162 New York Reports 12 at 20 (1900); Judge Ingraham in *Campbell v. The Sun* (unreported, Supreme Court, N.Y. County, May 14, 1926); Restatement of Torts, sec. 583.

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so drop to a lower level of conduct than before. Or, as in the case of Prohibition, they may both disobey the new law and discard their old standards.

Consequently, it is very important that any new legal device we recommend for dealing with inaccuracy shall tend to strengthen existing good behavior, instead of upsetting present practices without much assurance of substituting fresh habits of desirable conduct.

To sum up this point, it is better to increase the general probability of truth in the press than to use compulsion to produce what we believe to be a correct account of some particular transaction.

*b) To enable persons who feel aggrieved by a statement in the press to vindicate themselves without demanding cash.*—The old-fashioned libel action is today not well adapted to the needs of a great many citizens. We are looking for a good remedy which they can use instead. Besides promoting the public cause of truth, the aim is to help private citizens to live happily under modern conditions. We do not want their welfare sacrificed unduly because of the communications industries, essential though these are to the operation of a democratic society.

*2. Is retraction or reply the better method for correcting falsehoods and mistakes?*—In answering this question, we must also ask, "Better for whom?" There are three parties to consider, the protester who alleges that the original press item was erroneous, the journal, and the public.

From the viewpoint of the protester, retraction is much more satisfactory. Instead of merely hoping that those for whose respect he cares will prefer his reply to the earlier report, he can point out to them that the journal has backtracked and conceded the rightness of his own position. Of



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course, there are some men who would prefer the right of reply for the sake of getting their lucubrations into a newspaper, but most protesters who do not want to go after money damages would, I believe, choose to vindicate their reputations by a retraction if they could obtain it.

The men who operate the journal have divided feelings. Retraction has the great merit of falling in with customary American practice. Decent papers often retract voluntarily before any mention of a libel action. Furthermore, retractions fit into our existing libel trials by way of mitigating damages, whether there be legislation or not. In contrast, the right of reply is novel in our journalism. Letters to the editors are a slight precedent, but these can be rejected or cut down to suit space and other desires. The editor can control the style of a retraction, but he might well balk at yielding high-priced inches to whatever gibberish any person who has been previously named chooses to send in for free printing.

Suppose, however, that the editor remains convinced that his original statement was correct, despite the protest and whatever subsequent investigation he has seen fit to conduct. In that event, it would be both distasteful and dishonest for him to print a retraction. Yet he might not have any serious objections to inserting the protester's side of the story, subject perhaps to requirements about quantity and quality which are not adequately furnished by the French *droit de réponse*. Later, I shall discuss the feasibility of reconditioning the French law for American consumption.

As to the public, we find the same sharp cleavage between the genuine retraction and the retraction in which the editor does not believe. Most persons would rather have a revised statement which honestly represents the convictions of both the protester and the staff of the journal than be obliged to

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choose between the conflicting assertions of the original article and the protester's reply. On the other hand, a retraction which the editor believes to be false is of little value to readers. If the original item was actually correct, readers will be misled by the appearance of truth which is conveyed by the forced retraction. It would be better for them if the editor stood by his guns and left them to judge for themselves after seeing a printed reply.

What has just been said makes me think that, except for the protester, the persons concerned would benefit about as much from a combination of optional retraction and the right of reply as from compulsory retraction.

One big objection to a law empowering a court to order a newspaper to print a retraction or else suffer penalties is the danger that many of these forced retractions will misrepresent the opinions of the newspaper. They may even contain mis-statements of fact, for the approval of the court is not a perfect guaranty that the retraction is true. The probability of dishonest retractions becomes greater as the legal pressure is increased. An optional retraction is not likely to be insincere because it is inserted to avoid the possibility of paying damages in a libel suit, but the sure prospect of imprisonment or a heavy fine is quite another matter. Many decent editors would rather take back what they believe to be true than go to jail. Of course, not all cases would be of this sort. The threatened penalty would sometimes make mendacious editors withdraw charges which were deliberately false. Some involuntary retractions would be right and others would be wrong. The trouble is that readers would have no way of telling which were which. Once you give this power to the courts, whatever they order printed is pretty sure to get printed whether it promote the cause of truth or not.

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A still greater objection to compulsory retraction arises out of the difficulties of administration. Before the judge issued his order, he would have to be convinced that the original article contained misstatements and that these would be corrected by the proposed retraction. This would oblige him to try many perplexing questions, presumably without the help of a jury. If the range of the remedy should extend beyond alleged defamation and include inaccuracies about the Protocols of the Elders of Zion, Pearl Harbor, etc., the issues would be just as baffling as if the newspaper were prosecuted for the same statements.<sup>31</sup> And the court's decision would have to be made fast, or else the retraction would come too late to do any good.

Even if legislatures could constitutionally impose this novel and very burdensome task on busy judges, the job would not be well done.

Therefore, I shall say no more about compulsory retraction.

*3. Should the right of reply be established by American legislatures?*—The right of reply has been shown to be the best new remedy for misstatements in the press, but, even so, it should not be adopted unless its advantages outweigh the objections to it.

*Arguments in favor of the right of reply.*—Without repeating all that was said about its benefits during my discussion of the French and German laws, I want to stress two great merits of the right of reply.

a) First, it gives any private citizen a cheap, expeditious, and convenient method for combating misstatements about himself in the press. Instead of waiting for his vindication until after he has undergone the delays and worries of a libel

<sup>31</sup> See above, chap. 7.

suit, he will usually get his reply published within three days. In most cases he will not need to hire a lawyer or go to a court; that will be required only when the newspaper refuses to print his reply. He can attack misstatements directly without dragging in extraneous questions about the defendant's fault and the amount of damages. He does not lay himself open to any charges of being a blackmailer or "a typical libel plaintiff," but comes before the public as seeking to uphold his reputation and the cause of truth.

b) Second, when the right of reply does get into court, it presents only simple issues for decision. In this respect it is not only superior to the other suggested remedies for inaccuracy such as a criminal prosecution or compulsory retraction, which (as we have seen) may force the court to devote much time to conflicting evidence and interpretations of facts; but it is also less burdensome to tribunals than an ordinary damage suit for libel. In a libel action the judge and the jury are faced with many perplexing problems—whether the original article was defamatory, whether various defenses existed, whether the defendant acted in bad faith, what is the money value of the harm to the plaintiff's reputation. None of these issues is raised by a suit to collect the statutory penalty from a newspaper which has refused to print a reply. Here the court is merely required to decide three questions: (i) Did the original article name or designate the plaintiff? (ii) Did the newspaper actually refuse to print the reply? (iii) Was this refusal excused by the nature or length of the reply? Only the last question presents any serious difficulties, and these are small in comparison with the complications of a normal libel suit. It is an outstanding advantage of the right of reply that the court does not have to bother at all to ascertain whether the original article contained misstatements. The remedy

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leaves its truth or falsehood to be decided by the public after reading both sides.

*Arguments against the right of reply.*—In spite of its merits, the right of reply is open to at least three objections.

a) First, it will impose serious and novel burdens on newspapers and judges. If the device be established, it is likely to be invoked frequently. We are not dealing here with some gap in the law relating to uncommon but grievous wrongs like fraud, which ought not to be remediless when they do occasionally take place. The naming of persons in a newspaper happens every day in every city. A flood of demands for the insertion of replies is very possible. Many of these demands are likely to come from cranks and not from the steady citizens whom we have in mind as needing the remedy. And it is fallacious to try to brush aside the difficulty by saying, "The journal has itself to blame; if it does not want to print replies, it ought to avoid misstatements." The vital point is that the reply has to be printed even if the original article was true. The protester does not need to establish any misstatements; it is enough that he was named. How can you have news unless individuals are mentioned? Every mention, no matter how accurate, involves the possibility of a reply. Nobody can calculate, before the law is enacted, how much space it will oblige newspapers to hand over free of charge. One can only guess that the sacrifice will be substantial. Recently I described the French statute to an able retired owner-editor and asked how he thought it would operate in this country. He answered, "It would be a blankety-blank nuisance."

I suspect that a good many judges would feel the same way about the proposed law. It is true that, if we took over the French statute without change, most requests for a reply would probably not require judicial intervention. The obliga-

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tion to accede to the request is very pressing under the French statute, regardless of the quantity and quality of the material submitted, so that refusals to publish might be comparatively uncommon; and it is only the refusals which come before the French courts. But I surmise that the law would be unworkable in the United States unless some changes were made (as described later) in order to permit disputes about quantity and quality to be submitted to a court in advance of publication. This would mean more judicial intervention in borderline cases than occurs in France. Even under the French law, the number of court cases under the statute has been considerable, as is shown by a mere glance at Barbier, the leading commentator on the Press Law.

This objection of inconvenience is very serious. It is a question for practical experience and judgment whether these burdens on newspaper space and judicial time are warranted by the advantages of the right of reply in promoting accuracy and enabling misrepresented citizens to vindicate themselves without going through the agony of a libel action.

b) Second, the remedy can be made futile by a little ingenuity, as was brought out by Goebbels' account of the German law. A newspaper can accompany the printed reply with a second insult worse than the first. Although the protester is then entitled to a second reply, it will not appear for a few days, whereas the editor never has to lose any time in hitting back. This objection seems to me less weighty than the first. No doubt, the right of reply will prove useless in a period of unrestrained controversy, such as Riesman described in France and Germany during the rise of the Fascists and Nazis, but all legal remedies are useless in such crises. I admit, too, that even under normal conditions there are malicious editors who would evade the law by commenting nastily

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upon the reply. The main value of the law would lie in its effect upon reasonably decent editors, who are now somewhat careless about correcting their mistakes. Like a traffic policeman, the proposed statute would bring them up with a round turn. It would make explicit a standard of conduct which they are inclined to overlook because of the exigencies of space and the demands of their business, without being bad people. If the right of reply gets a considerable number of journals into the habit of making corrections, other newspapers will follow along, and then the practice will become a well-recognized decency.

c) A final objection is of the sort I have already described, where the establishment of an unprecedented legal remedy runs the risk of demoralizing existing desirable practices. The present willingness of most decent editors to publish retractions may be weakened if the protester is given a statutory right of reply. The editor may say, "Go ahead and exercise your legal rights. I'd rather have you do that than go back myself on what I said yesterday." Inasmuch as a retraction, when it can be obtained, is better than a reply for the protester and the attainment of truth, any impairment of the existing custom of publishing retractions will be very unfortunate. We must remember that the compulsory insertion of a reply does not necessarily give the public the truth. As my survey of the French cases showed, there is no guaranty of the accuracy of the reply. The editor cannot refuse it, whatever his sound grounds for believing it contains false statements. The *droit de réponse* merely gives the public the opportunity to decide which of two conflicting statements is true and which is false. Indeed, it is entirely possible that both the original article and the reply will be full of lies, although on

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opposite sides. Of course, the reply is better than nothing, but we must not expect too much from it.

If it be proposed to take over the French statute just as it stands, what I have just said furnishes a strong argument in opposition. However, the objection would lose much of its force if we remodeled the French law for American consumption by combining optional retraction with the right of reply. It would be wise for a state statute to make use of our custom of voluntary retractions by giving the journal to which protest is made the choice of publishing its own revision of the original article instead of a reply written by the objector. In other words, the protester's right to have his reply printed would not arise if the journal were willing to make a suitable retraction covering the same ground as the submitted reply.<sup>32</sup> This would be a desirable option because retraction is better for the public and also for any victim of a mistake who is not chiefly interested in getting his own compositions into type. At the present time voluntary retractions are inserted either out of a sense of fairness or to avoid libel suits. The proposed law would also sometimes cause them to be inserted in order to avoid printing a reply. This slight increase of pressure might make voluntary retractions more common.

Summarizing this discussion of the desirability of the right of reply, I think that the decision really depends on the strength which we attribute to the first objection about inconvenience. On the one hand, the risk of judicial bother is not a fatal objection to new remedies, for otherwise the law would stand still; and the burden on newspapers of printing replies may be fair in view of the unprecedented possibilities of injury to reputation caused by the enormous circulation of

<sup>32</sup> A method for deciding whether the proposed retraction is suitable is discussed below, p. 192.



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journals today. On the other hand, we ought to be sure that the game is worth the candle.

An outsider like myself is not qualified to balance the probable gains against the probable losses. There has been very little printed or oral discussion in this country of the merits and demerits of the right of reply. Experts in journalism might perhaps see objections which I have overlooked, and they would know better how the new law would fit into the daily operations of a newspaper. Consequently, it is too early to make a positive recommendation that the right of reply be established by law.

*The right of reply should, however, be carefully considered in the near future. This is the unanimous opinion of the Commission on the Freedom of the Press.* Great newspapers and radio broadcasting have made the old-fashioned libel action inadequate. It does not sufficiently meet the need of individuals for protection against misstatements or the public need for accurate information about persons who are concerned in important affairs. If possible, the libel action for damages should not remain virtually the sole legal device to accomplish these purposes, but it should be supplemented by a more flexible remedy. The right of reply is the best alternative available. *Therefore, the Commission urges that this remedy receive widespread discussion by newspapermen and lawyers, not only in professional journals, but also at meetings of bar associations and of organizations in the communications industries.* The operation of the Nevada statute should be examined. Joint meetings would be most fruitful, at which journalists, radio owners and speakers, lawyers, judges, and law teachers might offer their respective contributions. Some way out ought to be found.

In the hope of aiding future discussions, I shall next con-

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sider two questions about the range of the proposed remedy and then offer some suggestions for the draft of a statute.

4. *Just what types of errors should the proposed law correct?*—In answering this question, the two most important factors to consider are: (a) to give a definite scope to the right of reply and (b) not to burden newspapers and courts with an unreasonably large number of requests. I am inclined to think that the French law deals well with both these factors. The remedy is not limited to defamatory statements about the protester. It is enough that he is named. Thus he can reply to other false statements to which he objects, such as those misdescribing his political affiliations, and he can also reply to disparagement of the product which he manufactures. Although a limitation to what was technically libelous would somewhat lessen the burden upon the newspapers, it would have the disadvantage of frequently raising the difficult problem whether a given statement is libelous or not. The French requirement of naming or designating an individual has the great merit of clean-cut objectivity. For the same reason, I like the French inclusion of both opinions and facts better than the German restriction to statements of fact, for it is often hard to distinguish between fact and opinion.

Group libels should, I think be left outside the proposed remedy. This accords with the French law, although it is contrary to Riesman's views. The legislature had better start with the simple problem of providing a satisfactory alternative to the ordinary libel action and see how it works out. If the very ticklish questions of group libel are introduced at the start, the law might easily break down by getting used overwhelmingly by groups. Much of what I said about the undesirability of legal remedies against group libel applies equally well to the right of reply. The evil lies too deep for

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any statute which deals only with words. The law may be wiser if it concentrates on violence, boycotts, and other conduct directed against a particular group and leaves the mere expression of facts and opinions to be counteracted by education and the improvement of public opinion.

The proposed law also fails to deal with false statements which are not about the protester, like the stories of the Protocols of Zion and the mysterious sixteen Poles in Russia. The burden on the space of newspapers and on the time of courts would be tremendous if anybody had the right to demand the insertion of his reply to any press item which he considered false. When one article provoked several replies, must all be printed, and, if not, whose should be selected? We cannot afford to turn every citizen into a watchdog of inaccuracies. It is beautiful to think of courts enlisting wholeheartedly in the search for truth, just as it would be beautiful to think of all the professors in a given university going over to Greece to relieve the starving population. But what would become of the people who need the help of both professors and judges within the range of their traditional tasks?

If, in addition to the compulsory right of reply, our law should adopt the other French remedy (*rectification* in Article 12 of the Press Law) which forces a journal to print a correct account of official transactions, this might have some value in promoting truth about public matters. For example, if several newspapers are giving an inaccurate account of a quarrel between Poland and Russia, the Secretary of State or some other federal official might issue a careful governmental statement of the actual facts as they have been found by our diplomatic agents. It is very probable that such a statement, which would be a sort of equivalent to a British White Paper, would be published in full or correctly abstracted by the newspapers

who have previously erred. If, however, any of these papers misrepresented the contents of the official statement, an Act of Congress like the French Article 12 would permit the Secretary of State (or the official issuing the document) to compel the offending newspaper to insert a governmental rectification summarizing the document correctly. I have already indicated that the mere right of a reply would not be helpful to correct the original mistake, since a Russian or Polish statesman would be unlikely to sue.

5. *In what media should corrections be compelled?*—Newspapers and other periodicals, such as magazines, are the only media to which the French and German statutes apply. Experience under those statutes has shown that the law does not always work well for magazines. A reply which is the same length as a book review or a biographical article imposes a tremendous burden on space; if it has to be published free, the expense to the magazine is large. Although Barbier shows that the French law is adamant, it seems to me that an American adaptation might well place a maximum length on all replies even though the original item be long. For example, a page of a magazine would give a reasonable opportunity to reply to a long article or book review, and even half a page might be enough. True, the protester might not be able to meet all the points in the original article, but, on the other hand, brevity attracts readers. At all events, a short reply is better than no reply at all, which is likely to be the situation under existing American law. Still another possibility for magazines will appear in connection with the remedy now to be suggested for replies to the radio and motion pictures.

The radio is obviously unsuited to the simple machinery of reply provided by the French and German statutes. It might be entirely natural for a commentator to mention two or

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three prominent persons, e.g., Mr. Ickes, Mr. Pauley, and Mr. Truman, in a single broadcast. If each of those three men should possess the legal right to reply, they would take over practically all the time of this commentator for his next broadcast. The whole character of news comments might easily be changed by such a legal requirement. Consequently, French and German courts have held their statutes inapplicable to the radio.

Correction by the French and German machinery is also difficult for newsreels. Even in printed media, publishers of books and pamphlets cannot easily insert a reply.

Should the right of reply therefore be abandoned as to all media except periodical publications? Not necessarily. It seems to me feasible to vary the machinery according to the nature of the medium.

*My tentative solution is to give the persons who are responsible for the radio broadcast, the newsreel, the book, or the pamphlet—both authors and owners—the option of having the reply published in a newspaper at their expense:* Although the French and German statutes always put the reply in the same setting as the original statement, this is not an essential feature of the remedy. The English statute of 1843 modified this standard remedy in one situation where some other relief was better. Instead of letting the victim of misstatements in a magazine wait a whole month for a retraction, the editor could offer to publish the retraction in any newspaper to be selected by the victim; and such an offer would reduce damages for the libel. This ingenious way out seems equally good for the radio and the newsreel. Suppose that a broadcasting station in Chicago mentions a well-known politician in a manner distasteful to him. The law might say that, if the politician was not granted equivalent radio time, he could request the station to

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pay for the insertion of his reply in the *Chicago Tribune* or other large newspaper; the station would also have the option of printing its own retraction in the same newspaper. This remedy would not burden the station so much as a correction in radio time, and it might be about as satisfactory to the protester. It is true that it might not reach the persons who listen to the radio at the same hour night after night. On the other hand, many listeners who heard the first broadcast would miss a later broadcast, but would be likely to see the correction in the press. Indeed, a good deal of the existing publicity about radio discussion of persons now reaches people through newspapers. If a correction is made over the radio, that fact is mentioned in the newspapers and so reaches a wider circle of citizens. Why not utilize the newspapers directly? Of course there may be cases where the correction in another medium will not reach all the radio audience, but this is bound to happen whatever the mode of correction. Hence, it is worth while to adopt the method which is most convenient for all concerned.

A newsreel item would similarly lead to a reply or retraction in a newspaper. The same remedy seems appropriate for the correction of misstatements in books and pamphlets, although we have to remember that the financial resources of publishers, especially the publishers of pamphlets, may not be sufficient to pay for newspaper space. In the case of magazines, an editor might be glad of the option to print the correction in a newspaper rather than in his own pages.

Thus far I have spoken of a single newspaper. Where the broadcast goes over a whole network, the correction ought fairly to appear in newspapers in different parts of the country. Probably the intervention of a court would be necessary in order to insure a selection which would give adequate relief

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to the protester without unduly burdening the station or producer who was responsible for the original reference to the protester. The same problem arises for newsreels and nationwide magazines.

I do not feel sure that this solution of the difficulties of the radio and the newsreel is practicable. The chief difficulty is that the right of reply cannot practicably be limited to proved misstatements. It applies to every naming of a person. Still, my suggestion does offer a possible adaptation of the right of reply to new instrumentalities of communication.

### SUGGESTIONS FOR FRAMING AN AMERICAN STATUTE EMBODYING THE RIGHT OF REPLY

In accordance with the preceding conclusions, I suggest consideration of five modifications of the French and German law.

1. *Possible court intervention before the publication of the correction.*—In the French and German statutes the court does not come into the picture until after the newspaper has refused to publish the reply, and then the only question before the court is whether a penalty should be imposed on the newspaper. The negotiations about the length and form of the reply are entirely in the hands of the protester and the editor. A court has no control over the quantity and quality of the reply except to declare *ex post facto* that they did or did not fall within the statute. In short, the court appears on the scene when it is too late to obtain a proper correction.

The French judges are very positive about this matter. They say that reply is the absolute right of the requester, that he is the sole judge of its tenor, that neither the editor nor a court can alter it. If it complies with the statute, the editor must take it. If it does not fit the statute, he can lawfully re-

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fuse it and nothing more happens. Thus, if the reply is badly written, nobody can revise or omit the undesirable portions; and if it is excessively long, nobody can lop off the surplus. This conception of an absolute human right is characteristic of the philosophy of the French Revolution, but it is entirely at variance with the attitudes of our own day. The correction of errors is the concern of the public generally and not merely a private matter for the individual who has been named.

Another important change in legal attitudes has occurred since the enactment of the first French statute in 1822. At that time the courts rarely acted unless a wrong had already been committed. It was their function to punish past crimes or give damages for past breaches of contract and other past wrongs. During the last sixty years courts have taken on a new kind of activity. They will on appropriate occasions advise the parties to a transaction about their rights and duties before any wrong has occurred. The hope is that a future wrong may thus be avoided. This declaratory judgment has been figuratively described as making courts service stations and not merely repair shops. The scope of this new remedy must not be exaggerated. Courts do not exist to answer all conceivable questions. They sit to settle actual controversies. Hence, a court will not give a binding decision about the constitutionality of a pending statute. For similar reasons, a court should not give a declaration about the historical authenticity of the Protocols of Zion. In spite of all this, the request of a protester for the correction of a newspaper item about him does present a clean-cut controversy which is appropriate for a judicial declaration about the satisfactory character of the proposed correction.

This suggestion might work as follows: Mr. X demands a correction of a newspaper article which mentioned him and



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submits a reply which he asks the newspaper to print. The editor objects that the reply violates all rules of grammar and also is obscene. Under the French and German statutes, the quarrel about these points cannot get before a court at once. The editor must either publish the reply and risk a prosecution for indecency or refuse to print and risk the penalty. Instead I propose that either side shall be able to submit the text of the reply to a judge for a rapid decision from which there will be no appeal. If the judge approves the text of the reply, the newspaper must publish it. If he disapproves it, the protester can submit a new version. In the course of the conference with the judge in his chambers, he will be likely to throw out ideas which will facilitate the preparation of a reply acceptable to both sides. The same procedure will be appropriate if the editor offers to print a retraction, and the protester insists that this does not adequately correct the original article. The judge would not pass on the question whether the original article was true, but he would authorize the retraction if it covered the same ground as the reply. Otherwise, he would order the reply printed.

2. *The newspaper should have the option of publishing its own retraction instead of the protester's reply.*—Although the French and German statutes relate only to reply, such an optional retraction is thoroughly in accord with existing American journalistic practices and with the retraction statutes in many states. I have already set forth arguments in favor of this option.

3. *The quantity of the reply should be carefully limited.*—The French and German statutes place limits on what can be published free and allow a vaguely defined surplus to be compulsorily inserted at regular advertising rates. There does come a point when this surplus is so great that the editor can

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refuse to publish, but the law fails to specify that point. There is some sense in a moderate paid surplus, because the protester may easily run a little beyond his free space, but the law ought to specify only a small leeway of this sort, for example, 25 per cent of the free space. Also, there are difficulties about the free space in the French and German statutes. First, since it is measured by the length of the original references to the protester and not by the length of the whole article, which may conceivably be devoted to other persons and matters, disputes may easily arise about quantity of the actual reference to him. In accordance with my earlier proposal, such disputes would be settled by the judge in advance of publication. Secondly, if the original reference was long, for example, a book review, a reply of equal or double length would make unreasonable demands upon the valuable space of an American newspaper. Hence, I think that our statute should fix an absolute maximum for the reply, regardless of the length of the original reference. For a reply to be published in a newspaper, this maximum might conceivably be a certain number of inches; for a magazine, it might be a page or half a page. Inadequate as this may be, it is better than no reply at all under the present law.

4. *The quality of the reply should be subject to judicial approval or disapproval in advance of publication.*—This method would dispose conveniently of three elements of quality which have come before the French courts too late to do any good.

a) *Indecency.*—Instead of leaving the editor to solve this troublesome problem at his own risk, the court would pass on it seasonably. The judicial approval of the reply as decent should protect the editor from prosecution, because the judge can adequately represent the public while he looks over the reply.

## COMPULSORY CORRECTION OF ERRORS

b) *Libel on third persons*.—Here the judge's approval cannot give a newspaper immunity, because it would be improper to cut off the right of the third person without hearing his case.<sup>33</sup> However, there may be occasions where talk about libel is merely the editor's excuse for his refusal, and the judge would say that his fears are groundless. Even when there is a possibility of a future libel action by the third person against the newspaper, the court might still order publication if the protester should furnish an adequate bond from a surety company to indemnify the newspaper against such a liability.

c) *Vituperative and offensive statements in the reply*.—The French judges have had a great deal of trouble in deciding *ex post facto* whether these were excused by the nature of the original article. Under my proposal, this question would be decided by the judge in chambers before publication. Since no third persons are involved, such a procedure seems very convenient. Of course, the newspaper and its staff would be barred from maintaining a libel action against a protester for what he says in a reply approved by the judge in his consultation with the protester and the editor. One more defect in quality, not recognized by the French courts, consists of faulty grammar and style. Still, it seems to me that the newspaper may fairly require a reasonably good standard of writing in anything which appears in its columns. The judge might find it interesting and amusing to act as a theme corrector for the moment.

5. *Insertion of the correction in a different medium*.—When the original reference to the protester was by the radio or a newsreel or a book or pamphlet, the law might provide the

<sup>33</sup> See *Commonwealth v. Boston Transcript Co.*, 240 Massachusetts Reports 477 at 482 (1924), as to the difficulty of preventing libel suits against a newspaper for matter published under legal compulsion.

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defendant the choice of publishing the reply or optional retraction in one or more newspapers which were calculated to reach the persons who had been affected by the original reference to the protester. This novel feature of the law requires very careful consideration.

In spite of what has been said about the possible desirability of the compulsory right of reply, it is my opinion that the chief cure for falsehoods in mass communications should be sought outside the realm of law. Reckless misstatements in a particular newspaper are not isolated events in its life. They are an expression of the soul of that newspaper. Occasional attacks on a few falsehoods here and there, by libel suits or by new legal remedies, may accomplish a little, but they will not alter the things which make it a poor newspaper. The community will not get the kind of newspaper it needs so long as irresponsibility prevails to a substantial extent among editors and owners. And law cannot reach what is inside human beings. The community must proceed on a broader front and with other weapons. Somehow the community must make the newspaper want to be better. If this task be hopeless, then a way must be found to get another and better newspaper started.

The remedy for falsehood in the communications industries is to extend and strengthen by all possible means the professional obligation to tell the truth.

## *DIVISION B*

### *PROTECTION OF COMMON STANDARDS OF THE COMMUNITY*

**U**NDER this title may be listed obscenity, blasphemy, profanity, and educational variations from communal standards. Of these, obscenity is the only topic which requires extensive treatment, and I shall deal not only with its general nature (chap. 9) but also with the way it is handled by local authorities in connection with the sale of books (chap. 10), by censors of motion pictures and the radio (chap. 11), in the Customs (chap. 12), and in the Post Office (chap. 13). Blasphemy is virtually a dead letter in the United States outside Massachusetts. Profanity requires no separate discussion. Educational variations from communal standards include such matters as the Tennessee Anti-evolution Law, teachers' oath laws, compulsory flag salutes, Wisconsin legislative regulation of textbooks on American history, the Rapp-Coudert Committee in New York ousting radical teachers, etc. Since formal education is outside our sphere, detailed presentation of this will be omitted.

The topics included under this heading are, it must be confessed, somewhat miscellaneous; but, in addition to the specific characteristics of each topic, they all involve a mixture of two rather different purposes.

In the first place, the law wants to prevent the senses of citizens from being offended by sights and sounds which

## PROTECTION OF COMMUNITY STANDARDS

would be seriously objectionable to a considerable majority and greatly interfere with their happiness. From this standpoint, a nasty word in a streetcar is treated like a lighted cigar—the law is interested in the immediate effect on the sensibilities of others. American law has enforced minimum standards of civility ever since Colonial times, when, as Schlesinger says:

“People were punished, usually in public, for scandal-mongering, cursing, lying, name-calling, even for flirting, jeering, ‘finger-sticking’ and making ugly faces. Swains who won the affections of maids without parental consent risked fines of from five to ten pounds with costs. A gossip or scold might be exhibited with tongue pinched in a cleft stick or, as Massachusetts preferred, be ‘Gagged, or set in a Ducking stool, and dipt over Head and Ears three times in some convenient place of fresh or salt water.’ Profane persons and intemperate drinkers were consigned to the stocks, when not whipped like slanderers and the perpetrators of insults. The object of these penalties was not merely to chasten the offender, but to dramatize for onlookers the consequences of gross breaches of decorum.”<sup>1</sup>

A longer view inheres in the second purpose, which seeks to avoid the ultimate demoralization and disintegration of social unity considered likely to result if certain types of thought are widely expressed. For example, the presentation of very unconventional sex relations in Eugene O’Neill’s *Strange Interlude* did not contain a single offensive word or phrase. The suppression of the play in Boston, while rather risqué farces were tolerated, was probably due to the fear that the spread of such ideas might years hence break down monogamous

<sup>1</sup> A. M. Schlesinger, “Learning How To Behave,” *More Books: The Bulletin of the Boston Public Library*, XXI, No. 1 (1946), 5.

## PROTECTION OF COMMUNITY STANDARDS

marriage, which is a widely cherished institution. Here the law is really enforcing an ideology. One of the ties which holds the community together seems imperiled. The older generation thinks its world is falling apart. No doubt, if put to it, the objector would concede that *one* book or play will not thus undermine society. His point will be, that if this one be permitted, others like it will follow which must be permitted too. Then the demoralizing influences will become numerous enough to make disaster probable.

Some such explanation seems necessary to account for the intense opposition aroused by some literary and artistic creations, which is out of all proportion to their immediate influence. Nobody even suggested that any wife who saw *Strange Interlude* had actually been induced thereby to hunt out some highly gifted Adonis to father her next child. Yet the mere questioning of our accepted conceptions of marriage (which are still accepted years after *Strange Interlude*) operated like the push of a button to release a high-tension current of emotions. Very likely heretics were burned amid applause for a similar reason—the religious unity of the nation was in danger. And one guesses at traces of an old-time fear of supernatural vengeance. Certain sins on the part of a few, if tolerated, will lead to the punishment of the whole community. “Thou shalt not suffer a witch to live.” The Puritans of Massachusetts enacted the statute entitled “Provoking Evils” during the disasters of King Philip’s War for the express purpose of averting further divine wrath.<sup>2</sup> Hence they attempted to end various fallings from grace, including “the evil of pride in Apparel, both for Costliness in the poorer sort, and vain, new strange Fashions both in poor and rich, with naked Breasts and Arms, or as it were pinnioned with the

<sup>2</sup> *Colonial Laws of Massachusetts, 1672-86* (ed. Whitmore, 1887), p. 233.

## PROTECTION OF COMMUNITY STANDARDS

Addition of Superfluous Ribbons, both on Hair and Apparel."

The proportions of the mixture of the two purposes vary with the topic and also with the passage of time. Thus the crime of blasphemy, still on the statute-book of Massachusetts,<sup>3</sup> was naturally created by a colony where only members of a single church could vote. Outspoken dissenters rent the fabric of the community and were punishable with death except that soldiers need only have their tongues bored by a hot iron. Nowadays, the statute has been invoked only against very offensive public attacks on revealed religion.<sup>4</sup> Wide variations in belief are no longer feared in the Commonwealth of Emerson, Channing, Phillips Brooks, and Cardinal O'Connell, but the sensibilities of listeners are still safeguarded by the old law, a bit too sedulously since another statute against cursing and swearing seems adequate. In the crime of profanity, the ideological element is barely perceptible. On the other hand, the ideological element predominates in laws designed to check educational variations from communal standards. Disapproval is visited upon certain teachers and textbooks because the objectors desire the national tradition as they conceive it to be passed on to the next generation intact. The charge of communism against teachers in connection with some of this legislation connects it with our next main heading of "Protection against Internal Violence and Disorder." But here there is no close prospect of revolution. The fear is not of violence but of degradation of an assumed ideology.

<sup>3</sup> *Massachusetts General Laws* (1932), c. 272, sec. 36.

<sup>4</sup> "The Bimba Case," in Chafee, *The Inquiring Mind* (1928), p. 108.



## DIFFICULTIES AS TO THE LEGAL TREATMENT OF OBSCENITY

OF ALL the topics discussed in this book, obscenity is the most perplexing. It is the stock example cited to show that there are some limits on freedom of the press. If we disregard libel and similar injuries to individuals and think only of publications which disturb the community, obscenity is the type of objectionable material as to which there is the strongest support for some kind of suppression. Almost everybody agrees that some line ought to be drawn which will shut out a considerable amount of indecency.<sup>1</sup> And yet there are wide differences of opinion about the proper location of this line, and it is very hard to know what good is actually accomplished by the condemnation of a particular book. For example, a purpose of the law which is constantly stressed is the protection of young people from prematurely acquiring information about physical relationships between men and women. One of the reasons given by the Massachusetts court for suppressing *Strange Fruit* was its unfitness for juvenile reading.<sup>2</sup> Ironically, just after the authorities had forced this book off the market, the Bostonian youngsters who were supposed to be protected by its disappearance were left completely at lib-

<sup>1</sup> The exceptional view of absolute libertarians was discussed and rejected early in chap. 1.

<sup>2</sup> *Commonwealth v. Isenstadt*, 318 Massachusetts Reports 548 at 557 (1945).

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erty to read front-page newspaper accounts of the trial of Charles Chaplin, which supplied them for a few cents with far more detailed and prurient information than they could have obtained from the somber pages of the expensive novel. The fact is that we are not at all clear what we are driving at.

The difficulties which confront the law are twofold. In the first place, the nature and scope of the substantive wrong have to be determined. And then, because the existence or nonexistence of the wrong is by no means self-evident, suitable machinery must be devised which will fairly sift out permissible publications from those which should be condemned.

### DIFFICULTIES AS TO THE NATURE AND DEFINITION OF THE SUBSTANTIVE WRONG

When a trial judge is obliged to instruct a jury in an obscenity case or to pass on the facts himself without a jury, and when an appellate court reviews the decision of another tribunal, not much help in drawing the line is furnished by previous legal experience with the crime. The uncertainties in describing obscenity can be illustrated by a few sample definitions.

When the first British legislation on the subject was introduced by Lord Campbell in 1857, his speech declared that the statute had the very narrow purpose of discouraging "works written *for the single purpose* of corrupting the morals of youth, and of a nature calculated to shock the common feelings of decency in any *well-regulated mind*."<sup>3</sup> Yet the first decision a decade later greatly broadened the scope of the law. Lord Cockburn said that the issue was "whether the tendency of the matter charged as obscenity is to deprave and corrupt *those whose minds are open to such immoral influences*, and into

<sup>3</sup> My italics.

whose hands a publication of this sort may fall.”<sup>4</sup> Although this test has had much influence, it is plainly unsatisfactory. It is just as if the law denied a driving license to an automobile owner whenever it was found that he might conceivably run into a careless pedestrian who darted in front of his car. Any painting or statue of an unclothed woman would be condemned by such a test because of its harmful effect upon pathological minds. In other parts of the law, for example, in automobile accidents, enforced standards are based on the conduct of the ordinary reasonable man under like circumstances. It is entirely out of keeping for a legal standard to be derived from abnormal persons. Even the conservative Massachusetts court in the *Strange Fruit* case refused to take this extreme position. Justice Qua said:<sup>5</sup>

. . . . The statute was designed for the protection of the public as a whole . . . . a book placed in general circulation is not to be condemned merely because it might have an unfortunate effect upon some few members of the community who might be peculiarly susceptible. The statute is to be construed reasonably. The fundamental right of the public to read is not to be trimmed down to the point where a few prurient persons can find nothing upon which their hypersensitive imaginations may dwell.

The test which Justice Qua did accept was as follows:

The thing to be considered is whether the book will be appreciably injurious to society in the respects previously stated [arousing lustful desire and corrupting youthful morals] because of its effect upon those who read it, without segregating either the most susceptible or the least susceptible, remembering that many persons who form part of the reading public and who cannot be called abnormal are highly susceptible to influences of the kind in question and that most persons are susceptible to some degree, and without forgetting youth as an important part of the mass, if the book is likely to be read by youth.

<sup>4</sup> *Regina v. Hicklin*, Law Reports, 3 Queen's Bench 360 at 371 (1868). (My italics.)

<sup>5</sup> *Commonwealth v. Isenstadt*, 318 Massachusetts Reports at 551-54 (1945).

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He went on to reject the view, which we shall soon see expressed by Judge Woolsey in another court, that a book should not be condemned if sincerity and artistry are more prominent features of it than obscenity.

In dealing with such a practical matter as the enforcement of the statute here involved there is no room for the pleasing fancy that sincerity and art necessarily dispel obscenity. The purpose of the statute is to protect the public from that which is harmful. The public must be taken as it is. The mass of the public may have no very serious interest in that which has motivated the author, and it can seldom be said that the great majority of the people will be so rapt in admiration of the artistry of a work as to overlook its salacious appeal. Sincerity and literary art are not the antitheses of obscenity, indecency, and impurity in such manner that one set of qualities can be set off against the other and judgment rendered according to an imaginary balance supposed to be left over on one side or the other. The same book may be characterized by all of these qualities. Indeed, obscenity may sometimes be made even more alluring and suggestive by the zeal which comes from sincerity and by the added force of artistic presentation. . . . Sincerity and art can flourish without pornography, and seldom, if ever, will obscenity be needed to carry the lesson.

. . . . We do not go so far as to say that sincerity of purpose and literary merit are to be entirely ignored. These elements may be considered insofar as they bear upon the question whether the book, considered as a whole, is or is not obscene, indecent, or impure. It is possible that, even in the mind of the general reader, overpowering sincerity and beauty may sometimes entirely obscure or efface the evil effect of occasional questionable passages, especially with respect to the classics of literature that have gained recognized place as part of the great heritage of humanity. The question will commonly be one of fact in each case, and if, looking at the book as a whole, the bad is found to persist in substantial degree alongside the good, as the law now stands, the book will fall within the statute.

Many persons are probably in accord with this formulation of principles, but, even so, they are likely to disagree about their application to a particular book. This is demonstrated by the division of the Massachusetts court as to whether

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*Strange Fruit* passed the test. This novel is a frank picture of life among whites and blacks in a small southern city, and its central feature is a liaison between a white man and an intelligent girl of color. Marriage is impossible under the state law. The couple eventually separate. The man is murdered, and the book ends with the lynching of an innocent Negro. *Strange Fruit* is more outspoken in its language than I like, but it has been highly praised by reviewers and is sold with impunity everywhere outside Massachusetts, being a best-seller in several cities of the South as well as in the North. After the Boston police had warned bookstores to stop dealing in the novel and the Cambridge police had adopted a like course, a Cambridge store sold a copy publicly to Bernard De Voto, a well-known author. The proprietor was convicted by a judge sitting without a jury.

The question whether this conviction should be reversed evoked contrary opinions from members of the Supreme Judicial Court of Massachusetts. On the one hand, the majority, though not squarely holding the novel obscene, decided that the trial judge could reasonably find it obscene and so sustained his action. (This ingenious avoidance of the most puzzling issue in the case will be discussed when I come to problems of procedure.) Justice Qua, for the majority, after reviewing the numerous disagreeable references in the book to matters usually left out of novels, concluded that, regarding the book as a whole, a jury (or a trial judge, whom Justice Qua regarded as exercising the same function) could reasonably find that *Strange Fruit* contains much that would tend to provoke lascivious thoughts and to arouse lustful desire in the minds of substantial numbers of the public and that this questionable matter is not necessary to convey any sincere message the book may have.

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On the other hand, Justice Lummus, in dissenting, did not take issue with Justice Qua's general views on obscenity but only with his conclusions on this book. Justice Lummus said:

It must be conceded that the book in question is blemished by coarse words and scenes, some of which appear irrelevant to the plot. Yet in them I can discover no erotic allurements such as the opinion makes necessary for a conviction. On the contrary, their coarseness is repellent.

The book is a serious study of the relations of different races in a small southern town. It is a grim tragedy, not relieved even by humor. Virtue is not derided, neither is vice made attractive. In the book, the wages of sin is literally death. The reader is left depressed, unable to solve a tragic problem.<sup>6</sup>

It is possible to pass beyond these questions of application which split the Massachusetts court and attack the main position of the court as to the proper legal test for obscenity. The opponents of Justice Qua's reasoning derive strong support from the decision of Judge Woolsey in the United States District Court in New York City, sanctioning the importation of Joyce's *Ulysses*, which the customs officials had ruled obscene.<sup>7</sup> Judge Woolsey, unlike Justice Qua, attached great importance to the issue of the author's sincerity. In other words, the actual text of the book should be viewed in the light of the author's intent:

. . . . Of course, in any case, where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called, according to the usual phrase, pornographic, that is, written for the purpose of exploiting obscenity.

<sup>6</sup> *Ibid.* at 561.

<sup>7</sup> *United States v. One Book Called "Ulysses,"* 5 Federal Supplement 182 (N.Y., 1933); affirmed in 72 Federal Reporter, 2d Series, 705 (C.C.A. 2d, 1934) by Judges A. N. Hand (who wrote opinion) and Learned Hand, Judge Manton dissenting.

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On applying this test to the book, Judge Woolsey concluded that it was lawful: "But in 'Ulysses,' in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist." He stressed "Joyce's sincerity and his honest effort to show exactly how the minds of his characters operate."

The words which are criticized as dirty . . . . are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe. . . .

In many places [*Ulysses*] seems to me to be disgusting, but although it contains, as I have mentioned above, many words usually considered dirty, I have not found anything that I consider to be dirt for dirt's sake. Each word of the book contributes like a bit of mosaic to the detail of the picture which Joyce is seeking to construct for his readers.

. . . . One may not wish to read "Ulysses"; that is quite understandable. But when such a great artist in words, as Joyce undoubtedly is, seeks to draw a true picture of the lower middle class in a European city, ought it to be impossible for the American public legally to see that picture?

In spite of this emphasis on the author's sincerity, Judge Woolsey did not make it the only issue in an obscenity case. It is obvious that one must also consider the harmfulness of the book to the community. The mind of the reader is more important than the mind of the author. If sincerity were enough to excuse really dangerous acts, most anarchists who throw bombs would be let off. Was *Ulysses* dangerous in itself? So Judge Woolsey recognized that, besides establishing Joyce's artistic sincerity, he must also apply a more objective standard to the book in order to determine "its effect in the result," regardless of the intent with which it was written.

Thus the judge had to face our perplexing task of defining "obscene." After referring to the opinions of other judges that

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the word meant "tending to stir the sex impulses or to lead to sexually impure and lustful thoughts," he said:

Whether a particular book would tend to excite such impulses and thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts—what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the "reasonable man" in the law of torts and "the man learned in the art" on questions of invention in patent law.

He went on to say that the risk in the use of this test by a judge sitting without a jury was that, however fair he might intend to be, his notion of the impressions made by the book upon the normal person would be "too much subservient to his own idiosyncrasies." Hence Judge Woolsey had consulted two friends who satisfied his conception of normality. Both, after reading the book, agreed with him that it did not fulfil the legal definition of tending to excite sexual impulses or lustful thoughts, "but that its net effect on them was only that of a somewhat tragic and very powerful commentary on the inner lives of men and women." And so Judge Woolsey reached a guarded conclusion:

I am quite aware that owing to some of its scenes "Ulysses" is a rather strong draught to ask some sensitive, though normal, persons to take. But my considered opinion, after long reflection, is that, whilst in many places the effect of "Ulysses" on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac.

Judge Woolsey's opinion may be supplemented by an extract from a letter to a member of the Commission, written by the late Curtice Hitchcock, publisher of *Strange Fruit*, at a time when the Postmaster General was seriously considering the exclusion of the book from the mails:

"I am . . . primarily concerned with books in what follows, both because books are my trade and because I do



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happen to feel rather deeply that books, even more than magazines and newspapers and pictures and radio, lie at the very heart of the problem of intellectual freedom.

"It was not for nothing that Hitler chose books rather than any other form of free intellectual life to burn in his symbolic bonfire.

"Books always have been and we pray will always be a freer form of expression than those forms which have mass circulation, such as newspapers, magazines or motion pictures. The mass circulation media inevitably have to pay more attention to popular taboos and prejudices of one form or another because they have to make themselves attractive to so very many different kinds and classes of people. A book, however, is something which any individual can take or leave alone. Its circulation can be large or small, directed at the large or the small audience as its author and publisher will. If it pleases A and offends B, B doesn't have to buy it or read it. It isn't as though, like the newspaper which appears on the front doorstep each morning, one had to read it. Consequently it has always been the most adult form of expression which we have. Consequently also it has always been the means which the community uses for the testing and development of new and pioneering ideas in the arts, in the sciences and in the philosophies. To tamper with freedom of expression in book form, therefore, is the most dangerous exercise of interference with freedom of thought which can be imagined. The minute any administration in this country at the behest of its own prejudices, starts trying to suppress writing which is generally regarded by the literate book community as serious writing—at that moment a really serious blow will have been struck at the intellectual and moral progress of the American community."

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It is clear that if Judge Woolsey's technique had been used, *Strange Fruit* would have been declared lawful. Whenever the work in question possesses obvious literary or artistic merits, the *Ulysses* decision is the best guide we have. And yet I doubt if it furnishes a universal solution of obscenity problems. The few well-known banned books which get talked about represent only a small part of the material which is submitted to government officials for consideration under the obscenity laws. They have to pass on an enormous number of publications which most thoughtful citizens fortunately never see. In these run-of-the-mill cases there is little evidence to show whether the author was expressing his artistic integrity or merely seeking to make money out of people who crave indecency. Assume an official or judge who is shocked by the dubious passages but is broad-minded and anxious not to condemn everything that he personally dislikes. Judge Woolsey's opinion will not give him much help in determining what to do.

The last definition to be mentioned is used by Mr. Huntington Cairns, the present Treasury censor of imported matter, whose work will be reviewed in chapter 12. He regards the statutory word "obscene" as meaning *sexual stimulants not customarily brought into public view*. It will be observed that this test is not self-explanatory. It merely ties a new standard to one already in existence. This is very appropriate to the particular task in which Mr. Cairns is engaged. He measures the admissibility of books and pictures from outside by a synthetic standard of what is allowed inside. That is a just practice. If it is not safe for certain matter to circulate domestically, then it ought not to come in from abroad; and, on the other hand, it would be absurd to exclude at the border

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books and pictures which can be freely sold in American bookstores.

In domestic cases, however, Mr. Cairns's definition appears likely to be less useful. Then there is nothing to tie it to, except itself. It pretty much says, "We will permit what we permit," which is going around in a circle. In run-of-the-mill cases it might be helpful to ask whether this sort of thing is customarily kept out of public view, but such a static attitude might easily fetter American works of literary and artistic distinction. The public may benefit from learning about what has hitherto been kept in the background.

The upshot of the foregoing discussion is that no legal definition of obscenity is very satisfactory. Indeed, I am forced to the conclusion that no attempt to frame a definition which will work in all situations is likely to succeed. There are at least four reasons why this task of formulation is so difficult.

First, law likes to be logical, whereas it is impossible to be wholly logical in dealing with relations between the sexes. The subject, by its very nature, includes a large element of irrationality. It does not fit into the routine life of this workaday world. It takes us to heights and depths otherwise unknown, and the heights and depths are so uncomfortably close to each other that often a single path may lead either way. When the facts themselves are necessarily fraught with contradictory emotions, it is hopeless to expect officials and judges to be coldly reasonable in dealing with literary representations of those facts.

Second, the obscenity law undertakes to protect a common standard of the state, whereas really there is no such thing. The division of each community into groups, which was described earlier, results in several standards of decency, de-

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pending on the particular group—wide readers, occasional readers, Catholics, Protestants, lovers of art, etc. One group wants free access to much that another group considers unsafe. Under such circumstances the attainment of a consistent test which will meet with general approval requires larger mutual concessions than many citizens are willing to make. This situation gives great importance, as we shall see, to the size and characteristics of the tribunal which actually decides the issue of obscenity.

Third, obscenity is a complex idea. It includes three different real or supposed social injuries: (i) Offensiveness, which links indecency to profanity and public drunkenness. (ii) The ideological element which, for example, leads the authorities to object to a book questioning the desirability and permanence of monogamous marriage. This element has no necessary relationship to immoral acts. A few states forbid married women to obtain information from doctors which might interfere with a policy in favor of large numbers of children. (iii) Stimulation of sexual impulses and impure thoughts, which may perhaps bring about vicious conduct. This is, of course, the element which creates the most perplexity. We have no means of really knowing how much emotional harm is caused by reading of this sort, or the extent to which the harmful possibilities are offset, in some cases by a fuller understanding of the forces which mold and mar human lives, and in other cases by sheer entertainment and amusement as relief from the fatigue and monotony of work. Perhaps research will some day be undertaken in order to enlighten us on such matters. Meanwhile those who pass on a questionable publication are largely reduced to guesswork about its effect, and the guessing is inevitably affected by their own reading and emo-

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tional experiences. Here, again, we see the importance of the selection of the persons who decide the issue.

Thus the obscenity law is aimed at three different though related evils, of which only the first is clearly conceived. The attempt to do three things at once is bound to cause uncertainties and confusion.

Fourth, if reading were confined to normal adults, the factors already set forth would cause plenty of trouble, but the situation is further complicated by the existence of two groups of readers whose powers of judgment are not fully developed. Courts and officials have been very solicitous about the need for protecting (i) abnormal persons and (ii) young people. Since Qua and Woolsey, able judges from opposite camps, are agreed in refusing to let the reading of many normal citizens be circumscribed by the peculiarities of the ultrasusceptible, we can hope that this group will eventually cease to influence the legal standard. Young people, on the other hand, present a serious and permanent problem.

Here, too, the acquisition of a better knowledge of emotional processes than we now possess is likely to render the problem less baffling. However, the law cannot wait for that time to arrive; it must act from day to day on the cases that arise. The most obvious evil concerns publications which are deliberately designed to be sold to youngsters and exploit their ignorance. Their suppression does not curtail any desirable communication of knowledge and ideas, so that I eliminate this matter from consideration. What concerns us is the condemnation of books written for adult reading because they may happen to fall into the hands of immature persons and be harmful to them.

Without denying that such a danger may exist, there is considerable reason for believing that middle-aged judges and

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legislators may be unduly apprehensive on this score because they have forgotten what it was like to be young. Their fears about outspoken passages in a novel involve several assumptions—that young people will read them at all, that they will read them with eager enjoyment, and that they will have the same understanding of their poisonous implications as a sophisticated adult and yet lack the adult's ability to reject what is bad. The validity of all these assumptions is doubtful; they seem to me to underrate grossly the immunity of healthy young people and their powers of discrimination. What I mean is best illustrated by the true story of a Cambridge man who used to drop into his son's room at Harvard on Sunday afternoons and sit around with the boy's college friends. The conversation on the father's side consisted mainly of selections from his unusually large repertoire of salacious humor. He assumed that he was making a great hit with the students until one day his son said to him: "Father, I wish you wouldn't talk that way to the fellows. Half of them don't know what you're talking about, and the other half don't like it!"

Somewhat the same idea was expressed by Justice Lummus in dissenting from the majority view that *Strange Fruit* might corrupt the youth:

The record contains no evidence to warrant that assertion, or to show that any adolescent ever read the book or would read it under normal conditions. . . . Of course, conditions that exist after prosecution for obscenity has been brought or publicly threatened, are abnormal and furnish no text of what the opinion calls the "probable audience" of the book. The market for any novel can be artificially stimulated and widened through curiosity aroused by actual or threatened prosecution in this Commonwealth, frequently to the satisfaction and profit of the publisher elsewhere.

Such knowledge as I have leads me to believe that without such artificial stimulation novels of the class into which the book in question falls are read by few girls and by practically no boys. The

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great mass of readers are mature women. Plainly the book was not written for juveniles. They would find it dull reading. Under normal conditions I think the book could do no substantial harm to the morals of youth, for few juveniles would ever see it, much less read it. And if by chance some should wade through it, I think it could not reasonably be found to have any erotic allurements, even for youth.<sup>8</sup>

We ought to have considerable confidence in the ability of maturing boys and girls to assimilate what is good for them and to ignore the rest or throw it away. Judges would do well to keep in mind this passage<sup>9</sup> about the education of "my cousin Bridget Elia," remembering that the books this girl read must have included Elizabethan dramas, Restoration plays, and eighteenth-century novels, many of which would surely be banned today if they were now published for the first time: "She was tumbled early, by accident or design, into a spacious closet of good old English reading, without much selection or prohibition, and browsed at will upon that fair and wholesome pasturage. Had I twenty girls, they should be brought up exactly in this fashion."

The conclusion to be drawn from the numerous difficulties which I have been describing is that judges and officials who have to pass on an obscenity case will find it more fruitful to develop an attitude than to search for a definition. Almost any definition of obscenity will bar many books which are now freely published and which most people believe to be valuable—for example, Sterne's *Tristram Shandy* and Voltaire's *Candide*. One member of the Commission said: "There is no line to be drawn. What is to be determined is not simply whether the material is obscene, but what degree of obscenity is permissible in the given state of public morals?" In other

<sup>8</sup> *Commonwealth v. Ikenstadt*, 318 Massachusetts Reports at 562.

<sup>9</sup> "Mackery End, in Hertfordshire," *Essays of Elia*.

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words, the real issue is how much frankness will the community stand?

There must be some limit. A point is bound to be reached at which the court's stomach will turn. But that should be put off as long as possible. It is not just a question of saving recognized classics. Some new books will eventually become classics, and many which will never attain that distinction serve a useful purpose by interpreting the life of today to the readers of today. Even as to matter of no literary or artistic merit, a logical and rigorous enforcement of the law would be a mistake. It would encourage inquisitorial methods, arouse a constant hurly-burly, and distract the attention of police and public from much more serious crimes.

The attitude to be developed by the men who have to decide a border-line case should, I think, include an awareness of the following points—that stamping on a fire often spreads the sparks, that many past suppressions are now considered ridiculous, that the communication of ideas is just as important in this field as in any other, and that healthy human minds have a strong natural resistance to emotional poisons.

### **PROCEDURAL DIFFICULTIES IN OBSCENITY CASES**

The inevitable vagueness of the standard of decency prevents many cases from obviously falling into the area of lawfulness or the area of illegality. Some kind of careful sorting-out is consequently required. The procedural mechanism by which the law does this sorting is very important. In succeeding chapters I shall describe in detail several different kinds of mechanisms, such as the Customs and the Post Office, which will demonstrate many of the difficulties of establishing a satisfactory procedure. Before coming to these specific topics, I



want to conclude my general discussion of obscenity by mentioning two procedural problems which constantly arise.

1. *Shall the publication be judged as a whole or only on the basis of the questionable passages which it contains?*—Although consideration as a whole is more favorable to the defense, it is surely the right method. Questionable passages often look much worse when they are wrenched from their context and the jury (or other tribunal) reads only a series of reflections on sex. Literary merit ought to affect the decision to some extent, as both Judge Woolsey and Justice Qua agreed regardless of their differences about the proper extent; and merit is most likely to be revealed by a continuous perusal of the book. If the book be condemned, the unobjectionable pages will be suppressed just as completely as the others; the tribunal ought to be fully aware of what it is doing. How much will the community lose of good along with the undesirable matter? Books are ordinarily read as a whole, and it seems sensible to say that a book which is involved in litigation ought not to be read in an unusual manner when its life depends on the result.

There is a little to be said on the opposite side. Everybody knows that books known to contain flagrant passages are frequently not read as a whole. Those who are looking for pruriency go straight for the worst pages. Then whatever is bad does harm, and the rest matters little. Furthermore, the "as a whole" test may be inconvenient to administer at a jury trial. The prosecutor cannot distribute twelve copies among the jurymen and tell them to read the book at home that evening. Every bit of evidence has to be submitted in the courtroom. A defense lawyer in an obscenity case related that he forced the prosecutor to read the entire book aloud to the jury. It took over a week, and several of the jurymen slept. At the end of this tedious trial, his client was promptly ac-

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quitted. And yet real harm might conceivably lie in a few inflammatory incidents, which would be singled out by members of the public.

Despite these drawbacks, the balance of justice leads to judgment of the book as a whole in most jurisdictions, even in Massachusetts, which formerly took the isolationist view.<sup>10</sup> However, the broader test will not necessarily save the publication in question. Some books are obscene as a whole. In others, the bad may be so bad as to outbalance the rest. And the "whole" test has only a very limited application to periodicals, where readers customarily skip about.

2. *Who actually decides?*—In almost all legal decisions personality plays some part. Human beings cannot be eliminated from the machinery of justice. The maxim, "A government of laws, not of men," is never completely true. Yet the human choice is restricted by settled rules, which we call law. In every decision, then, there is a traditional element and a personal element. When the rule is vague, like the standard of decency, it necessarily allows more leeway for the personal element. The foregoing pages have repeatedly called attention to the fact that the result of obscenity cases is rather dependent on the attitudes of the particular individuals who actually decide whether the publication is to be suppressed.

The makeup of the tribunal and the selection and training of its members thus become significant. It is desirable, as Judge Woolsey pointed out, that their judgment of how readers at large will react to a book should not merely express the way they themselves react to it. Now, it is plain that the chances for avoiding such a purely personal finding are increased when several men participate in the decision. Judge

<sup>10</sup> Cf. *Commonwealth v. Isenstadt*, 318 Massachusetts Reports at 502, with *Commonwealth v. Buckley*, 200 Massachusetts Reports 346 (1909).

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Woolsey took this precaution in unorthodox fashion by consulting two friends. The law may supply the same safeguard by intrusting the case to twelve jurymen or allowing an appellate court of three or more judges to substitute their judgment for that of a single official or trial judge. In such situations, individual whims and prejudices may cancel each other out. This is impossible whenever one person has the final say.

Therefore, it is a valuable principle for obscenity cases that *a single person should not in fact be able to suppress any book or periodical or work of art*. Even if the words of the statute make this possible, wisdom requires that other persons should be informally associated in the process of judgment. This principle and departures from it will be often discussed in connection with the specific mechanisms now to be described.

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### LOCAL CONTROL OF OBSCENITY IN PRINTED MATTER

**A**FTER the censorship of books was abolished in England and the American colonies around 1700, the criminal law became the usual method for controlling obscenity of all sorts, except that plays in England had to be licensed by the Lord Chamberlain. When motion pictures appeared, the criminal law of a state was sometimes supplemented by censorship, but it is still the sole legal means for checking obscenity in books, magazines, and newspapers everywhere except in Massachusetts. There a statute of 1945 allows an equity suit against the book as well as a prosecution against a vendor. This interesting new method for testing obscenity deserves attention after we have examined the way the criminal law works.

#### CONTROL THROUGH THE CRIMINAL LAW

Under modern conditions the criminal law may operate in three different ways: (1) by jury trial, (2) by trial with a judge sitting alone, and (3) by threats without trial.

1. *Jury trial*.—During the nineteenth century the criminal statutes against obscenity were almost always administered by the arrest of the vendor of a publication followed by a jury trial. Probably this is still the most used method of control, but the increasing willingness of accused persons in recent years to waive jury trial in all sorts of prosecutions has ex-

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tended to obscenity cases. For example, the seller of *Strange Fruit* was convicted by a judge.

Nevertheless, a jury is in the long run, I believe, the best tribunal we have for drawing the line between lawful and unlawful publications. It is objected that juries ought not to decide the fate of books, especially those of literary merit, because many jurymen never read books at all. Even if this be true, the judgment of twelve men may be superior to that of a single better-educated judge or official. I admit that no jury would be so well qualified to pass on *Ulysses* as Judge Woolsey, but "Nature had but little clay like that of which she moulded him." In state courts it is not always possible to know in advance which judge will sit in a particular criminal case. Whoever is assigned to an obscenity trial must be accepted with all his quirks and prejudices. He may be a rigid moralist who believes that high-school students will be corrupted by reading Juliet's wedding-day speech: "Gallop apace, you fiery footed steeds." Of course, any jurymen has his limitations too, but one advantage of trial by jury is that twelve men chosen by lot are likely to have different prejudices which will tend to offset each other. The division of the community into groups becomes less serious if several groups are represented on the jury. In the vague field of obscenity, a single judge must struggle hard to avoid using only the standard of his own group. Numbers reduce the personality factor.

There is another advantage to jury trial in obscenity cases. The law is trying to find out whether the book is safe for the community or not. Consequently, it is important to learn as well as we can whether the community wants this book—whether citizens think that anybody who wishes to read it should be allowed to do so. Of course that question cannot be put to the whole community, but the next best thing is to

address it to a fair cross-section of the community. Twelve men in the street are familiar with the amount of frankness that Tom, Dick, and Harry will stand, more so than a judge, who is somewhat set apart from the regular run of people by the seclusion and intense preoccupations of his work. Jurymen are not prone to squeamishness. They have been through the rough-and-tumble of life and encountered plenty of foul language (orally if not in print) without feeling that it has unfitted them for useful, decent lives. They expect harm to come from living rather than from books. Jurors know, too, how much good comes from living. They have seen that the antidotes for many vicious poisons are supplied by a sound upbringing, common sense, and ambition to get on in the world and start a family. They are likely to have a good deal of confidence in the ability of the ordinary man to right himself after stresses and strains. A judge in his study surrounded by books may readily get scared about the dangers of the printed page, whereas jurors can be led to consult their own experience and see whether they ever knew anyone who was ruined merely by what he read.

This is not saying that a jury will always be more tolerant in an obscenity prosecution than a judge sitting alone. It is easier to defend the condemnation of *Strange Fruit* by a trial judge than the condemnation of Dreiser's *American Tragedy* by a Boston jury.<sup>1</sup> In the long run, however, I would rather trust juries to know what is really harmful to the community and what may be left to "a wise and salutary neglect."

2. *Trial by a single judge.*—In spite of what has just been said about the good points of jury trial, a defendant may prefer to be tried by a judge. It is quicker and cheaper, and he

<sup>1</sup> *Commonwealth v. Friede*, 271 Massachusetts Reports 318 (1930).

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may also have confidence in the judge's education and general outlook.

One very important problem calls for discussion in this situation, namely, the nature of an appeal. The risk that the disposition of the questionable book will be determined by the peculiarities of one man rather than by the actual needs of readers is somewhat lessened by the possibility that his action will be reviewed by several judges in a higher court. However, appeal is only a partial cure for individual idiosyncrasies. On the one hand, it does not protect the community from an excessively lenient judge. If he acquits a dealer in gross pornography, the case is all over because an accused person must not be put twice in jeopardy for the same offense. And, on the other hand, a mistaken conviction will not necessarily be reversed. The defendant may not be able to afford an appeal; and, even if he does appeal, his chances of success will depend a good deal on the view taken by the appellate judges about the extent of their power to reconsider an obscenity conviction by a judge who sat without a jury.

This problem about the scope of appeal may seem pretty technical, but it settled the fate of *Strange Fruit*. Consequently, the significance of the two conflicting views ought to be explained.

a) By what seems to me the preferable view, the appellate court will decide whether the book is obscene or not. A conviction by a single judge will be reversed whenever the court is convinced that the book can be safely sold and read. It makes no difference that his mistake was reasonable. Liberty of the press is more secure under this view. With several judges passing on the issue of indecency, their joint deliberations will achieve a more balanced estimate of the dangers to readers and a fuller awareness of the evils of suppression than

is likely in a decision by only one man. Furthermore, the court then answers the question in which the public is most interested: Does the welfare of the community require that readers should be denied access to this book?

b) A more limited view is that the action of the trial judge will not be reversed unless it is clearly wrong. Whenever it is reasonable for him to go either way about a book, then his decision stands. This was the view of the Supreme Judicial Court of Massachusetts in the *Strange Fruit* case.<sup>2</sup> We do not know whether a majority agreed with Justice Lummus that the novel was lawful. Justice Qua refused to go into that question. Instead, he asked whether the trial judge could reasonably find it obscene. In view of the numerous outspoken passages, it was easy to say that the trial judge was not clearly wrong. Once this procedural approach was taken, the book was almost surely doomed.

The point I want to drive home is that, in the cases which really matter, this procedure gives the trial judge the final say about the circulation of a book. Thus it is a departure from the vital principle that there should be no one-man rule over freedom of the press. It is true that the trial judge's determination must lie inside the limits of reasonableness, but those limits are rather wide. In cases of the border-line books which arouse controversy, their very nature is likely to make it reasonable to decide either way. Just because these cases are very close and difficult, the location of the power to decide them becomes more important than ever, and there is great need for a safeguard against individual prejudices.

Although I disagree with this limited view, it is far from being absurd. It was very natural for the Massachusetts court to treat a conviction by a judge just like a conviction by a

<sup>2</sup> *Commonwealth v. Isenstadt*, 318 Massachusetts Reports at 556-57 (1945).



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jury. Appellate judges never override a jury merely because they disagree with its action. They do so only if they think that the jury reached an unreasonable conclusion, and even then they often refer the case to a second jury for a new trial. If, instead, the judges should substitute their decision on the facts for the verdict of the jury, they would be giving trial by judges instead of trial by jury, which is guaranteed by the Constitution.

Therefore, the only way to upset the limited view of the powers of the appellate judges is to demonstrate that a conviction by a trial judge in an obscenity case is not really like a conviction by a jury. I venture to think that there are strong reasons why a judicial self-restraint which is right when a court reviews the action of twelve jurymen is, on the contrary, unnecessary when several judges review the action of one judge. In a situation like that in the *Strange Fruit* case, there is no danger of transforming trial by jury into trial by judges. It is trial by a court in any event. The only question is whether the decision which counts shall be made by one lower judge or by several higher judges. The limited Massachusetts view rests on the assumption that a state supreme court is less fit than a single trial judge to determine what people ought not to read. Why so?

A jury does have qualifications which the highest court lacks. A jury conviction for obscenity has a quality all its own. It expresses the opinion of a cross-section of the community that the book is bad for the community. Jurymen are closer to the problem than judges. But a trial judge is not closer to it than appellate judges. They are just the same kind of people as he is, only there are more of them and they are more eminent, so that their judgment is likely to be wiser than his.

This is not a situation where the trial judge based his con-

clusion on evidence which is not available to the upper court. An example of that would be a dispute whether the defendant did sell the book, with witnesses testifying orally on both sides. Then the trial judge could see their faces and hear the tones of their voices and note their hesitations. The upper court, meeting months later, has no such opportunities for appraising the evidence, so that it is quite proper to give his conclusions from the conflicting testimony as much weight as the verdict of a jury under the same conditions. But when it comes to the question whether the book itself is indecent, the trial judge is no better off than the appellate judges. They have everything before them that he had before him. It is all in the book, and they can read too. If, after doing so, they think that he made a mistake even though reasonable, it is their job as the highest judges in the state to correct a mistake which is depriving hundreds of citizens of lawful access to the communication of ideas. Modest deference to the judgment of a subordinate is not customary when errors of law are under consideration. It is equally out of place when liberty of the press is at stake.

In reply to my argument, it may be said that if the accused wants a decision by many minds, he should request a jury trial; but when he waives a jury, he takes his chances on what a single judge may do. Hence when the trial judge reasonably convicts him of obscenity, the accused cannot fairly ask the appellate court to go into the case any more fully than if he had been found guilty by a jury. He chose a one-man decision, and he has no ground for complaint if it went against him. The weak point in this reasoning is that the accused is not the only person interested in the outcome of the case. The trial of the bookseller is also a trial of the book. If his conviction was mistaken, many readers will be unjustly deprived of the book.

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Their intellectual freedom ought not to be intrusted to a tribunal of one. Whatever the accused does should not prevent the law from determining obscenity by a method which adequately safeguards liberty of the press.<sup>2</sup>

One last word on a different phase of this topic of decisions by a single judge. I am anxious to avoid leaving the impression that such a man is wholly unfitted for the task of passing on obscenity. Although I think that one judge is not so good as twelve jurymen, I feel strongly that he is a great deal better than one professional censor, for reasons which will appear when the Customs and the Post Office are discussed. And a fortiori several judges are better than a censor.

3. *Warnings without trial.*—In some cities, notably Boston, the normal criminal procedure of charge, arrest, and trial has an odd way of breaking down and becoming transformed into a method for controlling books which is entirely different from what the legislature contemplated. The normal procedure works best when the prosecution can be directed against the publisher of a questionable book, because he has enough at stake to impel him to fight the issue of obscenity with vigor until it is settled by a jury or a court. Outside the state of publication, however, the only way to determine the lawfulness of a book by a criminal trial is for some bookseller to sell the book and get arrested. Although from the standpoint of readers the resulting decision in a courtroom is the best device for sorting out indecent books, the bookseller does not enjoy being the guinea pig on whom the book is tested.

<sup>2</sup> It is possible that in the *Strange Fruit* case the limited scope of the appeal was forced by established Massachusetts practice. I have not gone into this question because we are concerned not with the soundness of one case but with the desirability of this rule. If it be desirable, it can always be changed by statute, and other state courts may feel free to adopt the wider theory.

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His arrest casts a cloud on his shop, the trial is expensive and troublesome, and, if the case goes against him, he will go to jail or at least pay a substantial fine. Many booksellers naturally conclude that these heavy risks outweigh whatever small profits they can expect from copies of this one book. So they seek a safer method of learning what not to sell. Police and prosecutors are ready to co-operate with this desire, for they are always reluctant to arrest a reputable businessman in any trade without first giving him a chance to stop the practices which they think objectionable. It is a humane practice which saves them much trouble.

The outcome of this situation may be a system of warnings to booksellers that this or that book must not be sold. The source of these warnings varies. It may be a police official or the district attorney or even some private group which has an understanding with the police—a Watch and Ward Society or a committee of the booksellers themselves. The actual control tends to slide around among these agencies. If the warnings become numerous, they may be compiled into a black list which is distributed to the local bookstores and revised from time to time. The system really involves covert threats that any booksellers who ignore the warnings will be promptly prosecuted, coupled with informal assurances that those who faithfully comply are not likely to have trouble under the obscenity law. It is hardly necessary to state that reputable booksellers heed the warnings and quickly remove a banned book from their shelves, no matter how great its merits or how extensive its sales in other parts of the United States. Thus no trial takes place. The city has a virtual censorship of books unauthorized by any statute.

Whatever the convenience of this system for bookstores, its consequences are highly prejudicial to the reading public.

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All the customary safeguards of liberty of the press have gone by the board. The actual decision suppressing a book is made by one man or a group of men who lack the qualifications of either a jury or a judge for determining what is unlawful. Such decisions are reached without any trial or defense by a lawyer and they are reviewed by no court, except in rare instances like the *Strange Fruit* case when a courageous bookseller or publisher is willing to put up a fight. This uncontrolled censorship is likely to suppress far more books than convictions in court would do. Boston readers have been deprived by the black list of many well-known books, although none of the publishers were prosecuted in New York. The situation is at its worst when a prosecutor or a policeman acts as censor. It is not much better when control is vested in a private organization like the Watch and Ward Society, where the actual decision is likely to be made by elderly men morbidly interested in reading obscene books so that they can keep them away from others or by zealous employees anxious to exhibit activity in order to hold their jobs. When the booksellers do the censoring themselves, the public at least gets the benefit of literary training; but the booksellers are bound to be timid because they know that they will lose their privilege if they pass a few books which are subsequently denounced by local clergymen and moralists.<sup>4</sup>

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The system of controlling books by warnings from persons without legal authority aroused so much indignant criticism

<sup>4</sup> For a more detailed account of this system, see FSUS, pp. 536-38, and the several references there cited, especially Grant and Angoff, "Massachusetts and Censorship," 10 Boston University Law Review 36, 147 (1930), and "Recent Developments in Censorship," *ibid.*, p. 488.

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that Boston booksellers drafted legislation<sup>6</sup> and succeeded after eighteen years in getting it enacted in much improved form in 1945.<sup>6</sup> The central feature of this statute is that it permits an advance decision on the indecency of a book, without obliging anybody to commit a possible crime and run the risk of punishment. The law tries the book and not the bookseller.

This Massachusetts law deserves nation-wide attention. It seems to me the best method yet devised for drawing the line between decent and indecent books. The new remedy works like this: The attorney-general or some district attorney believes a book on sale to be obscene. He starts a suit in equity directed against the book. The trial judge examines the book summarily, and if he agrees that there is reasonable cause to believe it obscene, then he notifies all persons interested to come in and defend the book. Notice is sent by registered mail to the publisher, the author, and any other copyright owner. Booksellers learn of the proceedings through legal advertisements in a newspaper. If nobody bothers to defend the book, it is likely to be condemned by default.

If the book is worth anything, however, contestants are sure to appear. Then the case is set down for speedy hearing. Since the suit is in equity, a single judge will usually try it, but any person interested on behalf of the book can ask for a jury.<sup>7</sup> Experts may testify and evidence may be given about

<sup>6</sup> On the 1928 bill, see Chafee, *The Inquiring Mind* (1928), p. 140; FSUS, pp. 538-40. This bill provided for an injunction against the book, and I suggested that it might be unconstitutional under *Near v. Minnesota*, 283 United States Reports 697 (1931). The substitution of a declaratory judgment in the 1945 statute probably disposes of this objection.

<sup>6</sup> *Massachusetts Acts* (1945), c. 278, amending *Massachusetts General Laws*, c. 272, secs. 28-28H. See Note, 59 *Harvard Law Review* 813 (1946). This statute became operative too late to affect the *Strange Fruit* case.

<sup>7</sup> An amendment pending in January, 1947, allows the commonwealth also to obtain jury trial. This change is desirable. The customs law is similar (see 19 United States Code, sec. 1305; and below, p. 252).

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"the literary, cultural or educational character" of the book. At the end of the hearing the book is adjudicated obscene or not obscene. Either side can appeal to the Supreme Judicial Court.<sup>8</sup>

Just what is the consequence of a decree against the book? This is a very interesting point about the statute. The court does nothing at all to the book. It is not burned as under the Nazis. The decree is really a declaratory judgment, which is put on ice until somebody disposes of the book to a mature person and is prosecuted therefor. (Maturity is fixed by the statute at the age of eighteen, and sales to younger persons are in a special category, to be discussed later.) In this subsequent prosecution, the new statute makes it essential for the commonwealth to show (a) that the defendant was distributing the book and (b) that he did so "*knowing it to be obscene.*" Inasmuch as actual proof of knowledge may be difficult if the bookseller denies having read the book, the value of the prior declaratory judgment lies in dispensing with that difficulty. A prior decree against the book conclusively establishes the defendant's knowledge of its obscenity. Thus a bookseller must keep track of these equity suits and remember at his peril what books have been judicially condemned.<sup>9</sup> Anybody who subsequently sells such a book is almost sure to be convicted of crime and severely punished.

Conversely, if the equity decree was in favor of the book, a bookseller who is afterward prosecuted for selling it to a ma-

<sup>8</sup> Although this statute does not mention appeals, the general legislation on the right of appeal doubtless applies. Since the case is in equity, the state can appeal from a decree in favor of the book, although it cannot appeal from an acquittal for a crime.

<sup>9</sup> The statute sensibly makes a similar provision about sales while a case is pending. As soon as the court issues notice that a suit against a book is under way, every bookseller is bound to know about it. If he sells the book before the final decree, he takes the risk that this decree will be unfavorable.

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ture person will have a complete defense of lack of knowledge of obscenity, which will probably assure his acquittal.

These provisions about the binding effect of the equity decree in a later prosecution may be called into play very rarely. I venture to predict that an equity decree either way will usually settle the fate of the book. If the court condemns the book, it will disappear from the market in Massachusetts. And if the book is held not to be obscene, it will be sold freely to persons over eighteen. Such a result is very desirable and is a great improvement on the old situation of control by unauthorized black lists and occasional punishments. One can say that the legislature has adopted the best features of the black list and got rid of its drawbacks. Under the statute bad books are sorted out by a system of warnings from qualified sources after an adequate legal investigation with full opportunity for both sides to be heard. So far as sales to persons over eighteen are concerned, penalties may be practically obsolete except for those who trade in pornography with open eyes. No doubt some decisions will still meet with considerable disapproval, but this is inevitable if we are to have obscenity laws at all.

The new remedy has two additional advantages over the customary method of control by the criminal law. First, it tends to produce uniform treatment of a particular book throughout the state. Uniformity is unlikely when the obscenity line is drawn through a criminal trial. If a jury acquits A for selling *Flaming Youth*, and B later sells the same novel, the police may arrest B, and the jury which tries B will not be prevented by the former verdict from convicting him. Indeed, the law will take every possible precaution to keep the second jury from learning about the other case. If the two booksellers are tried by judges sitting alone, the second judge may be



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inclined to respect the findings of his associate, but he is not bound to do so. When H. L. Mencken was acquitted in Boston for selling a banned issue of the *American Mercury* on the Common to an agent of the Watch and Ward Society, a different judge convicted a Harvard Square dealer for disposing of the same magazine.<sup>10</sup> And an appeal will not necessarily establish uniformity. When the highest state court sustained the *Strange Fruit* conviction, it did not make the book unlawful even in Cambridge. Since the majority expressly refused to pass squarely on the issue of obscenity, it would be entirely proper for another trial judge, who agreed with Justice Lummus that the book is not indecent, to acquit the very same bookseller for making a second sale of this novel. The old practice could easily leave everything up in the air for the future.

Second, the new law will procure a clean-cut holding on obscenity if there is an appeal from the decree of the trial judge. Because the suit is in equity and not a criminal proceeding, the Supreme Judicial Court will not take the limited view of its powers which I have ventured to criticize, and merely ask whether the decision below was reasonable. Instead, the court will follow its customary equity procedure of reversing the single judge if it disagrees with his findings of fact. Consequently, the danger of one-man rule over the sale of books is nonexistent.<sup>11</sup>

There are, however, some features of the Massachusetts statute which are more questionable. These should be carefully examined in any other state where adoption of the new

<sup>10</sup> Chafee, *The Inquiring Mind* (1928), p. 137. For further proceedings see *American Mercury v. Chase*, 18 Federal Reporter, 2d Series, 224 (1926).

<sup>11</sup> If another state should adopt the Massachusetts remedy, it would be desirable to insert an express provision on this point in the statute. The scope of review on equitable issues generally is less wide in some states than in Massachusetts.

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remedy is under consideration. This is not the place for an extensive discussion of problems of draftsmanship, so I shall briefly suggest three points:

1. The new remedy might conceivably be extended to include, not only books, as in Massachusetts, but periodicals, pamphlets, etc., as well. These are equally important instrumentalities for the communication of information and ideas, so that it is desirable to have a better method of control than prosecutions and black lists.

2. The Massachusetts law is too rigidly limited to sales to persons over the age of eighteen. The new remedy is not available for sales to younger persons because then knowledge of obscenity is no longer an essential element of the crime. When books are to be sold to *children*, it is very likely fair to force the bookseller to read them through and assure himself that every book is above suspicion. But a college freshman is not a child, and yet he is often only seventeen. Contemporary novels are often assigned for reading in college English courses, as well as classics which violate orthodox definitions of obscenity. In such a situation a college bookstore is entitled to the benefit of the new remedy, instead of being obliged to run the risk of having faithful employees arrested and perhaps jailed by some squeamish judge. The statutory age should be lowered to seventeen and perhaps even to sixteen, when a young person is considered old enough in most states to go out to work and encounter much more corrupting influences than those of the printed page.

3. The new remedy is one-sided. It can be initiated only by a public prosecutor. Suppose that he objects to a new novel of distinction but refuses to start an equity suit. Instead, he or the police warns all booksellers that they will be arrested if they display the book. What is a bookseller to do now? He

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honestly believes the book to be decent as a whole in spite of certain passages, but he may go to jail if he sells the book to a man of fifty. If the court should find the book obscene, he cannot establish the statutory defense of lack of knowledge because he has read the book and knows just what it contains. In short, all the evils of the old black-list system are back again. The way out is simple. Amend the statute to allow the publisher or author or other copyright owner to start an equity suit against the attorney-general of the state, asking that the book be adjudicated not obscene. This reform is entirely in accord with common practice in declaratory judgment cases.<sup>12</sup> For example, a party to a contract often sues for a declaration that he is not liable under a certain clause, which the court then proceeds to interpret. The free circulation of books and other reading matter soon after publication is very important to the public unless the law is really violated. Hence the producers of the book should be able to vindicate the right of citizens to read it without being obliged to wait for the government to take the first step.

Finally, although the Massachusetts statute seems likely to work well,<sup>13</sup> it would be wise for another state not to imitate it for a few years until the success of the new remedy has been demonstrated in a few cases. Delay will also show what modifications are desirable.

<sup>12</sup> The omission of such a provision in the Massachusetts statute may be due to the fact that Massachusetts is behind other states in its general legislation on declaratory judgments.

<sup>13</sup> See the favorable comment on this statute by Justice Qua in the *Strange Fruit* case, 318 Massachusetts Reports at 561. The first case under the statute acquitted the book; the commonwealth will appeal (see J. Mitchell Morse, "Massachusetts Court Clears Forever Amber," *New York Herald Tribune Weekly Book Review*, March 30, 1947).

## ADMINISTRATIVE CONTROL OF OBSCENITY AND OTHER OBJECTIONABLE MATTER IN MOTION PICTURES AND RADIO

SINCE motion pictures and radio are, respectively, the subjects of two other publications of the Commission,<sup>1</sup> I shall simply compare the applicable governmental mechanisms with those used to control printed matter and discuss their relation to liberty of the press.

The supervision of radio by the Federal Communications Commission and of motion pictures by censors in some states and cities is not the only method for controlling obscenity and other departures from criminal standards. The criminal law is always operative. The theater which exhibits an obscene motion picture can be prosecuted under state law, and a federal statute punishes the interstate transportation of indecent films.<sup>2</sup> Filthy language in a radio broadcast may lead to the speaker's arrest by the local police. These situations raise much the same problems as those already considered in connection with books, so that they need not detain us further.

Censorship of motion pictures, where it exists, is of concern to us because it obviously ignores the principle against one-man control over obscenity. As to radio, Congress has not authorized the Federal Communications Commission to exer-

<sup>1</sup> *Freedom of the Movies* (1947) by Ruth A. Inglis; and *The American Radio* (1947) by Llewellyn White—both published by the University of Chicago Press.

<sup>2</sup> 18 United States Code, sec. 396.

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cise any censorship,<sup>3</sup> but obscenity, profanity, and knowingly false communications from a broadcasting station are grounds for the suspension of its license by the FCC.<sup>4</sup> Moreover, Congress may conceivably take away the existing immunity from censorship.

Is there any constitutional protection against censorship of films and broadcasts?

As a matter of logic and the strong policy in favor of the communication of ideas, the First Amendment and the related clause in the Fourteenth Amendment ought to apply to movies and radio as well as to newspapers and books. Historically, however, it has not worked out quite that way, as I pointed out briefly while discussing the Constitution.<sup>5</sup> The tradition of freedom for newspapers and pamphlets was ingrained in American minds before 1791. Anything approaching control before publication by a censor aroused an immediate revulsion. Recent Supreme Court cases have extended this established resentment to new attempts for the control of printed matter, such as heavy taxation<sup>6</sup> and roving injunctions against a scandalous newspaper.<sup>7</sup> When other forms of communication came before the courts, they did not benefit from such a firmly established resentment. The theater exemplifies the situation. The English have long been accustomed to the licensing of plays, although they would never allow the licensing of a particular book or a particular issue of a newspaper. Theaters were more or less under the ban before our Revolution. When they did come in, plenty of people were temperamentally inclined to favor a tight control by the au-

<sup>3</sup> 47 United States Code, sec. 326; see *ibid.*, sec. 315.

<sup>4</sup> *Ibid.*, sec. 305(m)(D).

<sup>5</sup> Above, p. 35.

<sup>6</sup> *Grosjean v. American Press Co.*, 297 United States Reports 233 (1936).

<sup>7</sup> *Near v. Minnesota*, 283 United States Reports 697 (1931).

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thorities. So far as I know, we have never licensed a particular play in this country, as the Lord Chamberlain does in England, but a theater must have a license which is usually renewable after a year. The possibility that renewal will be refused tends to make the theater delete any passage to which the controlling authorities object.<sup>8</sup> Contrast this situation with the condemnation which a court would visit on a law requiring a newspaper to be licensed annually. So far as I know the United States Supreme Court has never passed on theater licenses, and I cannot remember that their constitutionality has ever been questioned in a state court.

When motion pictures began, they usually appeared in vaudeville theaters, so that an association with licensing was early established. The United States Supreme Court upheld state motion picture censorship in 1915,<sup>9</sup> and many state cases agree.<sup>10</sup> If decisions are made by a single censor, all the dangers of one-man rule over ideas are present, since there is no appeal to a court.

Licensing of the radio was compelled by the limited number of wave lengths. However, Congress has done its best to prevent governmental control of the subject matter of broadcasts except for a prohibition against long-recognized abuses like profanity and obscenity. The Supreme Court has not squarely decided whether the First Amendment has any application to the regulation of broadcasting stations, but at any rate (so the Court has held) it does not prevent the refusal of licenses to stations which persist in network contracts

<sup>8</sup> See FSUS, pp. 529-36.

<sup>9</sup> *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 United States Reports 230 (1915).

<sup>10</sup> These are collected in Note, 64 American Law Reports Annotated 505 (1929). For a thorough description of the procedure of New York censorship see Benjamin, *Administrative Adjudication in the State of New York: The Education Department*, IV (1942), 170-82, 192-93.

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which are considered by the Communications Commission to be contrary to the public interest.<sup>11</sup>

I have now shown the historical divergence between the very wide range of liberty given to printing and the narrow scope given in the past to other forms of expression. The next question is whether courts might be persuaded to close this gap somewhat and extend the protection of the free-speech clauses to the theater, the motion picture, and the radio.

The theater differs from a newspaper in two ways which may be significant. First, the communication of news and opinions plays a much smaller part than in the traditional use of the printing press; entertainment and perhaps art are its main features. A judge like Justice Frankfurter who regards the First Amendment as designed to protect mainly the formative stages of political action might say that the amendment has no application to entertainment and art.<sup>12</sup> I shall return to this point when I take up the motion picture. Second, a theater is a place where people meet to amuse themselves. It has some resemblances to a dance hall. A night club with a floor show is halfway between. Plainly there must be some police control over amusement halls. On the other hand, a newspaper is merely read, and people do not gather in the newspaper office and cavort. I fail to see the possibility of abolishing all police control of theaters in view of this fact. One might say that a public meeting in a hall is analogous and yet is protected by the Constitution.<sup>13</sup> Still, everybody knows that a public meeting is a very different affair from a place of

<sup>11</sup> *National Broadcasting Co. v. United States*, 319 United States Reports 190 at 226 (1943). See below, chap. 23.

<sup>12</sup> See his majority opinion in *Minersville School District v. Gobitis*, 310 United States Reports 586 (1940), sustaining compulsory flag salutes in schools; and his dissenting opinion in *West Virginia State Board of Education v. Barnette*, 319 United States Reports 624 (1943), in which the majority invalidated such salutes. Compare my discussion, above, pp. 41, 52-54.

<sup>13</sup> *De Jonge v. Oregon*, 299 United States Reports 353 (1937); *Hague v. C.I.O.*, 307 United States Reports 496 (1939).

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entertainment. It falls under Justice Frankfurter's idea of an initial political process and, unlike theaters and dance halls, it has not been associated with immorality of conduct. This point does not mean that the governmental control of theaters should necessarily continue to be so arbitrary as it is now. If the nonentertainment aspects of the theater were better appreciated by those who make laws, a way might be found to shape the governmental control so as to apply roughly to objectionable acts and leave the expression of ideas somewhat the same freedom as such expression now possesses when it is in print. And conceivably a court might upset some arbitrary control of the theater. Yet I have not much hope of remedial judicial action. There are many subtle pressures which the authorities can bring on a theater without squarely presenting the issue of illegality of words and ideas before a court.<sup>14</sup> The theater owner acquiesces in the wishes of the mayor or the police without going to court, because the consequences of an adverse verdict are fatal to his enterprise. Therefore, I expect that freedom of the theater will come, not from any new court decision, but from a more enlightened public opinion and from improvements in the machinery of administrative regulation.

The motion picture offers more opportunity for constitutional protection. The resemblance to a dance hall has now disappeared almost entirely. Furthermore, the theater problem is local and under municipal regulation, whereas a photoplay has a nation-wide publication almost simultaneously and so is a subject for either national or state regulation. Of course there is some municipal regulation as well, but if existing state censorships were struck down by the courts, I surmise that municipal censorship would take warning and be more discreet than it is now. The cases of Jehovah's Witnesses show

<sup>14</sup> See FSUS, pp. 529-36.



the readiness of the Supreme Court to strike down arbitrary local control over the communication of ideas.<sup>15</sup>

It is argued that motion picture censorship is essential because of the number of indecent films which would otherwise be exhibited in cheap theaters outside the influence of the Hays-Johnston Office. Although the criminal law would still be available, it is said to be too slow and cumbersome to check such pornography. I fail to see, however, why pictures on the screen present a different problem from pictures of the same undesirable sort in cheap illustrated magazines. Yet we get along pretty well under a Constitution which makes censorship of periodicals impossible. And are people in Massachusetts and West Virginia, who are not guarded by state censors, more immoral than the sheltered citizens of New York and Virginia?<sup>16</sup>

The upshot of what I have just said is that, apart from history, there is only one conceivable good reason for denying to the motion picture the freedom which belongs to the printing press. This lies in the entertainment purpose of the movies and ties up with the first point I made about the theater. Is the protection of the First and Fourteenth amendments limited to the communication of news and political opinions? Is the Constitution unconcerned with art? Quite the contrary, as I have argued earlier.<sup>17</sup> It is possible that the Supreme Court might now be persuaded to overrule its decisions of 1915 upholding state film censorship.<sup>18</sup> The chances are par-

<sup>15</sup> *Lovell v. Griffin*, 303 United States Reports 444 (1938), and many subsequent decisions. See FSUS, pp. 398-409.

<sup>16</sup> I have noted censorship statutes in Connecticut, Florida, Kansas, Louisiana, Maryland, New York, Ohio, Pennsylvania, and Virginia.

<sup>17</sup> Above, pp. 52-54.

<sup>18</sup> The question is argued more fully in FSUS, pp. 544-48. See also "Censorship of Motion Pictures," 49 *Yale Law Journal* 87 (1939); Kadin, "Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting," 19 *Boston University Law Review* 533 (1939).

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ticularly good in the case of newsreels, which are very close to the press. (These are already exempted from the state censorship in Kansas, New York, and Pennsylvania.) And the Court will perhaps go still further and protect documentary and imaginative films as well, on the ground that liberty of the press embraces all discussion which enriches human life and helps it to be more wisely led.

The radio situation does not call for the overruling of any decision or indeed for reform in this connection. It is merely important to hold the freedom from control of subject matter which now exists. It seems foolish to question the governmental power to allot wave lengths, and the successive federal commissions have hitherto allotted wave lengths without interfering unfairly with the expression of facts and ideas. Of course, the danger is that the present freedom may be impaired in the future.<sup>19</sup> The recent demand of Representative Rankin of Mississippi for the scripts of Raymond Swing and other commentators shows what we have to fear. I hope that encroachments on radio content, such as this request envisages, will be resisted by the Supreme Court as contrary to the First Amendment.

Enough has been said to show the complexity of problems as to regulation of instrumentalities of communication other than print and addresses at meetings. The attempt of a great motion picture director to bring films within constitutional freedom of speech by the formula: "Speech is 'speech,'" presents far too simple a formula. To the law, at any rate, speech on the stage of a theater is not the same as speech on a soapbox.

<sup>19</sup> See "Indirect Censorship of Radio Programs," 40 Yale Law Journal 967 (1931); and other references in FSUS, p. 554, n. 68. Some past instances of control by the Federal Communications Commission are adversely criticized by Kadin, *op. cit.*, pp. 567 ff.

## CONTROL IN THE CUSTOMS SERVICE OVER IMPORTED PUBLICATIONS

**M**ECANISMS for determining whether publications violate communal standards fall into two broad types: (1) the courtroom type, involving decisions by jurymen or by one or more judges, and (2) the administrative type, involving decisions by a single official or by a board of officials. We have already seen these two types exemplified, the courtroom type by criminal prosecutions for obscenity and the administrative type by the censorship of motion pictures and by police warnings not to sell specified books. Although strong objections have been made to these particular uses of administrative mechanism in order to control bookstores and movie theaters, it does not necessarily follow that every kind of official supervision over publications should be abolished. Leaving aside war, when some censorship is regarded as inevitable if the enemy is to be prevented from learning our military secrets, we find two branches of the national government in which administrative mechanism has long been used on a large scale to weed out supposedly undesirable publications—the Customs Service and the Post Office.

### COMMON CHARACTERISTICS OF THE CUSTOMS AND THE POST OFFICE FAVORING EXTENSIVE CONTROL BY OFFICIALS

Despite the great differences in their normal work between the Customs Service and the Post Office, they have some important characteristics in common which made it easy for

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Congress to intrust both of them with the job of censoring. In the first place, it was not necessary to set up a whole new organization, as when a state legislature establishes censorship of motion pictures. Many customs and postal officials were already there. Secondly, these federal employees do not have to go out of their way to find questionable items, like city police visiting many bookstores to ferret out sales of indecent publications. Every book which comes in from abroad or is mailed passes automatically through the hands of government officials so that they can readily examine it for possible illegality. When something conceivably obscene falls right under an official's eyes in the ordinary course of his business, it is convenient for him to stop it from reaching readers until its lawfulness has been decided.

This brings us to the question, "Who should make the decision?" The handling of this problem in the Customs Service and the Post Office is bound to be affected by a third characteristic they have in common, namely, the fact that their officials do a great deal of deciding in any event. Postal officials are determining, for example, whether certain kinds of perishable food can go through the mail. Customs officials are constantly valuing imported articles and classifying them as dutiable at this or that rate. When officials habitually act like judges, it is quite natural for them to handle a dispute about the obscenity of a book. This seems a small matter in comparison with a contested classification under the Tariff Act involving thousands of dollars. The distinction that tariff rates have nothing to do with freedom of the press is easily overlooked.

Contrast the criminal law where the job of judging is taken over by courtroom mechanism right away. Not only is the defendant's guilt determined by a jury or a judge, but also

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the police must take him to a magistrate as soon as he is arrested and get judicial authorization for his detention in jail. Yet when a book is arrested at the border or in a post office, no court order is required. Although this allows customs and postal officials to interrupt the free flow of ideas, a different practice would be very inconvenient. If every seized book or magazine had to be referred to a judge immediately, the United States courts would be burdened with an enormous mass of publications, most of them clearly obscene. And much of the innocent matter which is now released by the officials after a day or two would be held up for weeks until a judge could find time to pass on it. Consequently, it is generally agreed that the use of administrative machinery in the early stages of proceedings against imported or mailed books disposes of the great majority of cases satisfactorily without bothering a court.

The real controversy turns on what ought to happen in the later stages of the contested border-line cases. Two main questions have arisen: (1) Should administrative mechanism handle these cases to the finish, or should courtroom mechanism be brought into play at some period? (2) How may administrative mechanism best be designed to perform either the entire task of judging books or a substantial portion of that task? The existing law answers these questions in one way for the Customs Service and in quite a different way for the Post Office. Therefore, it will be fruitful for me to present a comparative study of their respective methods for controlling indecency, beginning with the Customs.

### STATUTES AS TO THE CONTROL OF IMPORTED PUBLICATIONS IN THE CUSTOMS

Two separate sections of the customs legislation are applicable, a criminal statute and a forfeiture statute.

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The criminal statute provides severe punishment for any person who fraudulently or knowingly imports "any merchandise contrary to law."<sup>1</sup> In order to find out what is thus made criminal, one must look at the types of books condemned in the forfeiture statute (next discussed) and at several portions of the Criminal Code. For example, if an importer brings in a book by mail, he may violate statutes declaring many types of matter to be nonmailable,<sup>2</sup> such as infractions of the Espionage Act of 1917 and incitement to arson, murder, or assassination. Another crime under the Criminal Code is importing an obscene motion picture film by express or other common carrier.<sup>3</sup> If the government prosecutes a person on the charge of importing an obscene book, the determination of obscenity is expressly intrusted to a jury. Whatever I have previously said about the criminal law is relevant. The customs criminal statute requires no further attention, because in obscene-book cases the government rarely seeks to punish the importer. It usually relies on the forfeiture statute and proceeds against the book itself.

The forfeiture statute<sup>4</sup> is the basis of all the ensuing discussion of the Customs. It prohibits the importation into the United States of three types of objectionable matter: (1) books and other publications advocating treason or insurrection against the United States or forcible resistance to any federal law; (2) books and other publications containing any threat to take the life of or inflict bodily harm upon any person in the United States; and (3) "obscene" books and other

<sup>1</sup> 19 United States Code, sec. 1593(b), enacted as sec. 593 of the Tariff Act of 1930. Similar provisions have long been in force.

<sup>2</sup> 18 *ibid.*, secs. 334, 343, 344.

<sup>3</sup> *Ibid.*, sec. 396.

<sup>4</sup> 19 *ibid.*, sec. 1305, enacted as sec. 305 of the Tariff Act of 1930.

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publications, pictures, images, and articles.<sup>5</sup> Then follow two important provisions set forth later, which were inserted during the Senate debates.<sup>6</sup>

This statute took its present form in the Smoot-Hawley Tariff Act of 1930. The obscenity provisions are much older, going back to 1842 for pictures and 1890 for books. The new clauses about treason and insurrection and threats of bodily harm, etc., aroused much opposition when they appeared in the tariff bill as introduced in 1929.<sup>7</sup> It was urged that customs inspectors might interpret this language loosely so as to keep out a wide range of foreign political literature. For example, Alfred Bettman, a distinguished Cincinnati lawyer and assistant to the Attorney General during the first World War, wrote of the treason and insurrection provision as follows:

"If this really means what it says, then it is useless. For, as a matter of fact, nobody writes or imports any book or writing advocating or urging treason, insurrection, or forcible resistance to any law of the United States.

"In all the history of courts in the United States there has never been a conviction for treason [except during a war]; and Aaron Burr was the last man who advocated insurrection. But the proposed tariff bill proposes to place the interpreta-

<sup>5</sup> Additional prohibitions exclude drugs and articles for preventing conception or causing abortion, and lottery tickets or advertisements of lotteries.

<sup>6</sup> The Senate debates on this section of the 1930 Tariff Act are in 71 Congressional Record 4432-39, 4445-72 (October, 1929); 72 *ibid.* 5414-31, 5487-5520 (March, 1930).

<sup>7</sup> See the protests reprinted in 71 *ibid.* 4449-50 (Bettman, Chafee), 4471 (group of Harvard professors including F. W. Taussig, E. F. Gay, and Ralph Barton Perry); 72 *ibid.* 4893-98 (prepared by the National Popular Government League and signed by about 560 persons, including many college presidents, professors, librarians, authors, clergymen, etc.); 5501 (A. Lawrence Lowell, Niebuhr, John Dewey); 5506-7 (Bishop McConnell, John Dewey, Cornell professors, and other well-known educators, editors, etc.).

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tion and application of the section in the hands of customs officials and the Customs Court, and we know by experience that language of that sort is interpreted and applied by administrative officials in a manner most dangerous to civil liberties and contrary to fundamental constitutional conceptions.

"For instance, take a book which in a most scientific, impersonal, and philosophical manner discusses violence as a mode of political activity, for instance, as those written by the French political scientist, Sorel's work on Violence, or a book which discusses the ethics of revolution in a most philosophic and detached spirit. The author might even take his stand against the use of violence under any circumstances but include within his book, for purposes of discussion, the arguments of his opponents. Such discussions occur in the works of some of our most learned political scientists and constitutional lawyers. Such books do and ought [to] form part of the reading of students of problems of law, government, and ethics, and it is just such books which administrative officials, not equipped with the necessary philosophic and scholarly outlook, are apt to interpret as falling within a provision of this nature."<sup>8</sup>

This storm of protests encouraged Senator Cutting of New Mexico to urge the total repeal of the forfeiture statute. There were prolonged debates on the floor of the Senate, during which the desks of some opposing senators were piled high with risqué books (lent by the Customs and never returned).

These debates threw a good deal of light on what actually happened under the old law (before 1930) after a book was detained by a customs inspector because it looked obscene to

<sup>8</sup> 71 *ibid.* 4449. On the late Mr. Bettman, see FSUS, pp. 67, 147, 341 n., 442, 470-71.



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him.<sup>9</sup> According to Senator Cutting, the book was first turned over to the deputy collector of the port; and, after he had passed on it, it was sent to Washington for a ruling by the Deputy Commissioner of Customs, who examined it with his assistant. If there was any doubt as to the correctness of the decision of the local man at the port, the matter was taken up with the Commissioner of Customs and, in exceptional cases, with the Assistant Secretary of the Treasury.

Did this end matters? Not absolutely, so far as the statutes went. Let us suppose that a professor of Spanish was bringing back a book from Madrid and had it taken out of his trunk by a New York customs inspector, who thought it obscene. After going through a series of adverse decisions by officials as just described, he did have a theoretical right to appeal to some court or other by a procedure primarily designed by Congress to review valuations and classifications of pottery and woolen blankets. He could go to the Customs Court, which was not a regular court but a sort of board of impartial experts on technical customs matters,<sup>10</sup> or by acting at high speed he could get before a United States district judge.<sup>11</sup> But the professor who went to the 1922 Tariff Act to see what he could do would be very unlikely to find out about these possibilities of appeal, which are presented hundreds of sections away from the section relating to obscene books. If he went to the lawyer whom he was accustomed to consult on his in-

<sup>9</sup> For the procedure before 1930 as to obscene books, as compared with the provisions of the 1930 Act, see 71 Congressional Record 4436; 72 *ibid.* 5422-23, 5492, 5517-18.

<sup>10</sup> See 19 United States Code, sec. 1501; *Ex parte Bakelite Corporation*, 279 United States Reports 438 (1929). In 1930 the Customs Court lost its power to review obscenity cases and other charges of unlawfulness against books, works of art, etc.

<sup>11</sup> 42 Statutes at Large, p. 985, sec. 608 (1922). This is now 19 United States Code, sec. 1608. It is also superseded for our purposes by the Act of 1930.

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come tax and other personal affairs, the puzzling nature of the appeal statutes would cost the professor a sizable bill just to ascertain his rights, with more to come if he should decide to test the obscenity of the book before any kind of judge. Naturally, he would let the whole matter drop. In fact, very few customs cases ever reached a court.<sup>12</sup> Before the Act of 1930, the determination of the obscenity of a foreign classic was for all practical purposes made by a hierarchy of customs officials.

The results of this older system were very unsatisfactory. Some of the rulings are so absurd that it seems probable that they were really made by men at the ports, who were perfunctorily affirmed in Washington because of the normal disposition of a superior to promote departmental morale by backing up the actions of his subordinates when they do not contravene his cherished policies. Furthermore, it is only fair to the superiors to point out that they were appointed because of their qualifications for the difficult and essential work of collecting import duties and not because of their ability to judge books. During the debates Senator Cutting identified the four Washington officials who were engaged in censoring imported books, and said:

"While all those officials are undoubtedly very estimable gentlemen, I do not believe that there is a Member of the Senate who knows them who would ask for the opinion of any one of them on a work of literature or who would allow any of

<sup>12</sup> 71 Congressional Record 4437. The debates (*ibid.*, p. 4436) allude to a very few appeals to the Customs Court. The district court case mentioned (see below, n. 16) was under the criminal statute. I have found only three reported forfeiture cases of obscenity, all before the end of the Civil War: *United States v. Three Cases of Toys*, 28 Federal Cases, No. 16,499 (N.Y. 1843); *United States v. One Case Stereoscopic Slides*, 27 Federal Cases, No. 15,927 (Mass. 1859); Anonymous, 1 Federal Cases, No. 470 (N.Y. 1865) (pictures on handkerchiefs).

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them, or all of them put together, to dictate the contents of his library or the quality of the books which he should be allowed to read. The proof of that is in the black list."<sup>13</sup>

This black list was a long compilation of books to be banned, which was made up in October, 1928, by customs and postal officials in joint conference. It contained such well-known books as Boccaccio's *Decameron*, Ovid's *Metamorphoses*, the *Golden Ass* of Apuleius, *Daphnis and Chloe*, and the unexpurgated English edition of Remarque's *All Quiet on the Western Front*. For a time Voltaire's *Candide* was on it but was then taken off. It is an odd fact that, out of 739 books on the black list, 379 or more than half were in Spanish, while only 5 were in Italian and 10 in German.<sup>14</sup>

The outcome of these debates was a compromise. On the one hand, the attack failed to get the forfeiture statute repealed; and it did not prevent the enactment of new provisions excluding books which are held to advocate insurrection, personal violence, etc. As yet, however, these added clauses have amounted to much less than was feared. The only cases which have arisen concerned anti-Semitic literature from Germany and France, like Céline's *Bagatelles for a Massacre*, which might be taken as urging American pogroms. Serious interference with the importation of political discussion is always a possibility under the existing law, but the old obscenity clauses have up until now continued to supply the grist for customs censorship over publications.

Thus liberty of the press has not yet lost anything in fact because of the enactment of the Tariff Act of 1930. On the contrary, it has made notable gains through that statute. Although some new clauses widened the grounds of unlawfulness, two others made it possible to draw the line between

<sup>13</sup> 72 Congressional Record 5492 (1930).

<sup>14</sup> 71 *ibid.* 4434-36.

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what is forbidden and what is permissible more wisely than ever before.

In the first place, some of the worst absurdities of the black list were remedied by the insertion of a proviso allowing classics and other books of distinction to be removed to some extent from the operation of the forfeiture law. Previously, as Secretary Mellon stated, there was "no exception in favor of the so-called classics or of the work of leading writers of the day."<sup>15</sup> United States Judge Peck had declared in a criminal case involving Boccaccio and Rabelais:

There is no question in my mind but that most of the people who buy the so-called classics buy them for the filth that is in them rather than for their literary value. If they bought them for their literary value alone an expurgated edition would do equally as well as an unexpurgated edition. The fact that there is an expurgated edition would indicate there is something in the unexpurgated edition that is not fit for the average person to read. Congress in its wisdom has not seen fit to except the so-called classics.<sup>16</sup>

Senator Smoot of Utah asserted in debate: "It were better, to my mind, that a few classics suffer the application of the expurgating shears than that this country be flooded with the books . . . that are wholly indecent both in purpose and tendency."<sup>17</sup> Yet it was he who sponsored the following proviso which now follows the prohibition of obscene books, etc., in the forfeiture statute:

*Provided . . .* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.<sup>18</sup>

<sup>15</sup> *Ibid.*, p. 4435.

<sup>16</sup> *Ibid.*, p. 4436, quoted from *United States v. Kidd* (Ohio, 1922), otherwise unreported.

<sup>17</sup> 71 Congressional Record 4458.

<sup>18</sup> 72 *ibid.* 5414; 19 United States Code sec. 1505. Senator Cutting and Mr. Cairns, who now administers this proviso, took part in drafting it.

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Second, Congress reduced the practical control of officials over imported books by writing into the forfeiture statute a clear statement that determinations of obscenity (and the other types of unlawfulness) should be made by the United States courts.<sup>19</sup> These new statutory clauses describe what now happens to a book from abroad, after a customs inspector has detained it on suspicion of obscenity. There are three stages: (1) Upon the appearance of such a book at any customs office, unless the Secretary of the Treasury exercises his discretion to admit it under the proviso, it is seized and held by the collector to await a decision as to its illegality; and the collector informs the federal prosecuting attorney in that district about the seizure. (2) The district attorney begins a forfeiture proceeding in the United States district court. The decision as to obscenity, etc., will usually be made by a judge, but any party in interest (including the government) may demand jury trial. In either event, the decision is subject to review by the Circuit Court of Appeals and by the Supreme Court (if it cares to consider the case). (3) If this proceeding ends in favor of the book, it is released and goes freely to the person who ordered it from abroad; but if the book is adjudicated to be obscene (or within some other type prohibited by Congress), then "it shall be ordered destroyed and shall be destroyed."

Thus the law divides the task of controlling imported publications between the administrative mechanism and the courtroom mechanism. Officials have charge of the first stage of seizing the book and reporting on it. (When I take up the

<sup>19</sup> Apparently the first suggestion for an adequate judicial determination of unlawfulness was made by Senator Pittman of Nevada. This led Senator Walsh of Montana to draft an amendment much like the present statute, with help from Senator Swanson of Virginia and Senator Bratton of New Mexico (72 Congressional Record 5420-24, 5516).

## PRESENT OPERATION OF FORFEITURE STATUTE

actual present practice as to seized books, this preliminary determination inside the Treasury Department will be seen to possess a greater opportunity for wise judgments than one would infer from the mere language of the statute.) Furthermore, the Secretary of the Treasury has the last word on the question whether a book which would otherwise be unlawful can come in as classic or work of merit. But on the question of obscenity (and other prohibited qualities), it is the judges who have the last word.

### THE PRESENT OPERATION OF THE FORFEITURE STATUTE

The usefulness of the 1930 statute in facilitating recourse to the courts was quickly demonstrated. Within the next few years, Marie Stopes's books for married couples and Joyce's *Ulysses*, long banned by officials, were allowed entry by judges.<sup>20</sup> Yet something more than convenient judicial intervention was needed to make the control of imported books satisfactory. The best of court proceedings is a costly affair. For the Customs Service to keep on condemning books which would eventually be released after a contest in court was a waste of time and money for all concerned. And American readers might easily be deprived of many other books which were far less objectionable than those released, just because nobody was willing to run up a lawyer's bill for the sake of one book. It would be much cheaper and more expeditious if the official methods which produced the old black list were changed, so as to enable the administrative mechanism to draw the line of obscenity more wisely.

<sup>20</sup> *United States v. Married Love*, 48 Federal Reporter, 2d Series, 821 (N.Y. 1931), Judge Woolsey; *United States v. Contraception*, 51 Federal Reporter, 2d Series, 525 (N.Y. 1931), Judge Woolsey; *United States v. Ulysses*, 72 Federal Reporter, 2d Series, 705 (C.C.A. 2d, 1934), Judges A. N. Hand and L. Hand, affirming Judge Woolsey (see above, pp. 205-9), Judge Manton dissenting. A number of other cases, also decided adversely to the government, have not been printed in the law reports.

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Fortunately, an internal house-cleaning was brought about by the unwelcome publicity which the press was giving the Customs Bureau every time the courts let in some well-known book. In September, 1934, shortly after losing the *Ulysses* case, Mr. Morgenthau took the significant step of appointing Huntington Cairns as Special Legal Adviser to the Secretary of the Treasury<sup>21</sup> on the disposition of books, films, pictures, and statues under the forfeiture statute. Mr. Cairns, who was then practicing law in Baltimore, has been justly described in a public document as "an enlightened connoisseur of the arts and literature."<sup>22</sup> He has published books and articles in those fields and also on law and the social sciences.<sup>23</sup> Now he is secretary of the National Gallery of Art, which houses the Mellon and other collections. The Gallery occupies most of his time; he needs about one hour a week for his work in the Customs.

### THE PRESENT PROCEDURAL STEPS

The present procedure of administration of the Customs regulations is as follows:<sup>24</sup> There are still two geographically separated parts, just as during the Senate debates—the rulings at the port and the rulings in Washington. Suppose that a book appears at any one of about three hundred ports of

<sup>21</sup> This is also Mr. Cairns's present title, but for a while he was made Assistant General Counsel to the Treasury. His work is described in a public document which authoritatively covers the ground over which my text will travel informally, *Administrative Procedure in Government Agencies: Monograph of the Attorney General's Committee on Administrative Procedure*, Part 14: *Administration of the Customs Laws* (77 Cong., 1st sess.; Senate Doc. 10 [1941]), pp. 49-52. This is cited hereafter as "Acheson Customs Monograph."

<sup>22</sup> See below, pp. 348-49, where the whole passage in the Acheson Post Office Monograph is quoted.

<sup>23</sup> In connection with his work in the Customs, see his article, "Freedom of Expression in Literature," 200 *Annals of the American Academy of Political and Social Science* 76 (1938).

<sup>24</sup> See Acheson Customs Monograph, p. 50.

## PRESENT OPERATION OF FORFEITURE STATUTE

entry. It is examined for revenue purposes like any other imported object. The customs inspectors, or openers and packers—clerks who compare imports with invoice statements—may hold up the book just as they hold up other merchandise, sometimes using more or less arbitrary standards. Not long ago they held up a copy of Kant's *Critique of Pure Reason* and a Spanish translation of the Bible. The *Ulysses* case began when a clerk became curious at a paper-bound book being sold for fifteen dollars, cut the pages, and found "the dirtiest words I have ever seen in my life." The copy had been ordered by an actress, and the clerk refused even to let her see it because she was unmarried. Thus such an inspector is the first person to decide whether the book shall go to Washington, and he sometimes acts upon reasons which Mr. Cairns has been unable to discover.

The next man is the head of the division at the port of entry, equivalent to a foreman. Then the book goes gradually to the Assistant Collector, who usually carries the bulk of the administrative burden at a port, although sometimes the Collector does this. The importer, who was notified when the book was detained, can argue to any of these officials that it is not obscene. If at any step the book is thought admissible, it is permitted entry, and Mr. Cairns never sees it. If it is held up by all the port officials in succession, it must go on to Washington. When this happens, the officials are asked to specify their reasons for thinking that the book should be condemned, and they usually fail to do so.

Since 1934 the decision at Washington has been made by Mr. Cairns. If he concludes favorably to the book, it goes to the importer with no other review or chance for the government to make objections. If he decides against the book, the formal seizure takes place in accordance with the forfeiture



statute,<sup>25</sup> and the case is ripe to go to a court unless the importer accepts Mr. Cairns's adverse ruling.<sup>26</sup> Mr. Cairns acts for the Secretary of the Treasury, since the Secretary is presumably too busy with financial matters to bother about an erotic book.

If the condemnation of the book by Mr. Cairns should be followed by a contest in court, this would not take the form of an appeal by the importer from the adverse customs ruling. Instead, after a lawsuit had been started by the government to forfeit the book, the importer would appear as defendant and ask that the case be dismissed because the book is not obscene. The importer would be entitled to have everything tried right from the start—*de novo* as we lawyers say—without any regard to what Mr. Cairns and the port officials may have ruled. Indeed, the trial in court would be the only real trial of the book. The importer has no right to a hearing before Mr. Cairns, although in practice he is always allowed to come into his office for an informal talk about the book. Congress has expressly said that obscenity shall be decided by the district court,<sup>27</sup> subject to review by a higher court. Here is a very important difference from the procedure in the Post Office. There, as we shall see later, Congress has intrusted the same question of obscenity to the Postmaster General, and, after he has decided against a book, the courts must pretty much keep

<sup>25</sup> See my summary, above, p. 252.

<sup>26</sup> It is true that the forfeiture statute calls for a determination of obscenity in court; but, in accordance with advice given by the Attorney General in 1930, articles of small value which are deemed to be prohibited from importation by this statute are usually disposed of without judicial forfeiture. If there appears to have been no criminal intent in their importation, and the importer or addressee assents in writing to forfeiture and destruction, the Attorney-General stated that there is no reason in 19 United States Code, sec. 1305, why the owner cannot voluntarily forfeit the article to the United States and thereby authorize its destruction. When this happens, the case terminates with adverse ruling from Mr. Cairns.

<sup>27</sup> But see above, n. 26.

## PRESSENT OPERATION OF FORFEITURE STATUTE

their hands off. By contrast, whatever rulings of obscenity<sup>28</sup> are made in the Customs, from the port inspector through Mr. Cairns, are technically preparations for a possible later court proceeding against the book and somewhat resemble the decisions which are made in a criminal prosecutor's office when the evidence against an arrested man is examined to see whether it justifies trying to send him to prison.

Yet, in spite of what has just been said, Mr. Cairns's ruling against a book does in fact keep that book out. Under his administration of the regulations, no importer has undertaken to contest in court any of his decisions which held books and works of art obscene,<sup>29</sup> even though the bulk of his rulings in the sifted cases which come to him have been against admissibility. This seems to me a remarkable record for twelve years of work in a highly controversial field. Of course, this complete acceptance of his adverse rulings does not conclusively prove that all those importers regarded a contest as hopeless. One must allow for the possibility that some of them had good grounds for objecting but did not want to incur the expense of defending the book in court. Still, this possibility is considerably minimized by the fact that several courtroom fights were waged for books during the four years before 1934 and not one during the twelve years since 1934. If Mr. Cairns had unreasonably banned any books which were sufficiently good to attract many purchasers, the importers would have found it well worth their while to use the convenient judicial

<sup>28</sup> It is quite different when the importer petitions the Secretary of the Treasury to exercise his discretionary power under the proviso; the ruling by the Secretary (or by Mr. Cairns on his behalf) is then final under the statute (see above, p. 251).

<sup>29</sup> One or two cases on publications about birth control were contested in court, but this topic falls within a different clause of the forfeiture statute (see above, n. 5). A judicial decision admitting *Nudism in Modern Life* superseded an adverse customs ruling made before Mr. Cairns took office (*Parmelee v. United States*, 113 Federal Reporter, 2d Series, 729 [Dist. of Col. App., 1940]).

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remedy given them by Congress. At least, there would have been loud protests in newspapers and liberal weeklies. So far as I know, nothing of the sort has happened. The prolonged public silence about customs censorship during Mr. Cairns's regime creates confidence in his judgment.

In summing up the alteration since 1934 in the administration of the obscenity law inside the Customs Service, I want to recall my previous division of the process geographically into rulings at the ports and rulings in Washington. At the ports, one gathers, matters are going on much as they have always done in spite of efforts to have the officials think more about their reasons for holding up a book. The big change has come at the Washington end. There Mr. Cairns has replaced the numerous superior officials who used to decide about books, and he decides in quite a different way. Indeed, he has introduced a new technique of censorship, which will next be examined.

### THE TECHNIQUE OF ADMINISTRATIVE CENSORSHIP

When the port officials send a book to Washington as obscene, the forfeiture statute raises two questions for the Legal Adviser to the Secretary of the Treasury to answer: (1) Is the book "obscene"? (2) Even if it is, should the Secretary be advised that this is a proper case for the exercise of his discretion to admit "the so-called classics or books of established literary or scientific merit . . . when imported for non-commercial purposes"? Let us see how Mr. Cairns interprets each of these two statutory standards, and then how he goes about applying them.

#### a) INTERPRETATION OF THE STATUTORY STANDARDS

*Interpretation of "obscene."*—Obscenity falls into two classes: (i) Scatologic obscenity refers to the excretory func-

tions. "Lavatory humor" does not fall within many judicial definitions of obscenity in terms of sexually impure and lustful thoughts,<sup>30</sup> but, when it is so filthy as to be grossly offensive to most people and a degradation of human dignity, Mr. Cairns seems right in regarding it as falling within the word "obscene." Unless one wishes to abolish customs censorship of obscenity, he can hardly object to this ruling, which enables a good deal of shockingly foul stuff to be stopped at the border.

(ii) Sexual obscenity is more frequently in question. Mr. Cairns has had the courage to write his own definition and disregard several old federal cases which fall in with Lord Cockburn's desire to protect persons who are unusually susceptible to immoral influences.<sup>31</sup> Judge Woolsey's opinion in the *Ulysses* case<sup>32</sup> has not been very helpful because it based permission for entry on the esoteric character of the book. Mr. Cairns's definition applies "obscene" to the class of sexual stimulants which are not customarily brought into public view. He has said in an article: "It is the essential characteristic of obscenity that it is customarily hidden. This distinctive quality . . . is what we encounter no matter in what period or place we study it."<sup>33</sup> I have already spoken of this definition as very well suited to his task of sifting importations but less workable for domestic purposes.<sup>34</sup>

Mr. Cairns's article goes on to distinguish between art (in the broad sense) and pornography:

"Art . . . has its own morality, its own integrity, which those who would limit its treatment of sexual detail would do well to recognize. . . . We have to recognize, however, that

<sup>30</sup> Above, chap. 9. In *United States v. Limehouse*, 235 United States Reports 424 (1932). Justice Brandeis spoke of "filthy" in a postal statute as different from "obscene." On this case see above, pp. 55-56.

<sup>31</sup> See above, pp. 201-2.

<sup>32</sup> *Op. cit.*, n. 23 above, p. 79.

<sup>33</sup> See above, pp. 205-9.

<sup>34</sup> See above, pp. 209-10.

this principle of justification covers only half, or less than half, the case. Not all writing is literature, not all information is science. There is . . . . that class of material which is put forward with no other purpose in view than the stimulation of the sexual impulse. . . . In their bulk, these photographs and drawings, these miserably printed pamphlets and books, are as far removed from art as they could well be. Their effect, except on the prurient and the immature, is one of repugnance. A few productions designed by artists of considerable skill . . . . possess some elements of what might be termed art. Pornography of this order brings fabulous prices. . . . The principle which accords complete freedom to the artist and scientist in the treatment of sexual detail plainly does not justify pornography."

After taking up the argument that pornography should also be left alone by the law because the only remedy for it lies in a re-education of citizens in their conception of morality, Mr. Cairns pertinently observes that this proposed solution will, at best, take many generations. Meanwhile, we are face to face with a more practical problem:

"In what manner ought the existing obscenity statutes to be interpreted? No help is offered by showing, as is the customary practice of most writers, that such statutes, from the point of view of a sane sexual ethic, are irrational and ought to be abolished. Arguments of this kind, while they tend to foster a rational examination of the subject, are ultimately beside the point. . . . There is . . . . no likelihood whatever that the present obscenity statutes will be repealed. At the most, all that can be expected is that by administrative, legislative, or judicial action the statutes will be so interpreted or amended as to be productive of a minimum of social damage. None of the statutes defines the word 'obscenity'. . . . The

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process of definition involves the drawing of a line. Those who look upon censorship in its entirety as futile and vexatious hold this to be essentially an irrational task. They assume that no line should be drawn in getting rid of what they regard as an unqualified idiocy and evil. Nevertheless, as a practical matter, such a line must be drawn. Assuming the arbitrariness of obscenity statutes, their enforcement will still be undertaken by officials and courts. . . .

"Intelligent and informative discussion by experts of the difficulties and potential damage inherent in censorship performs at this point a salutary function. It may result eventually in the education of the officials charged with law enforcement. . . . Administrative officials, not the populace who in the main have only a negligible contact with art, stand first in need of re-education."

Mr. Cairns then gives his conclusion on the way an existing censorship law should be enforced:

"If the line must be drawn—and in practical politics the task is inescapable—we can draw it around only pornography with the largest possibility of minimum damage and maximum effectiveness. Although many writers have undertaken to show that pornography in itself is harmless and therefore ought not to be the object of governmental suppression, no positive case has been made out for it. The elimination of the crude and pathetic photographs and booklets which now constitute the bulk of the trade would be no loss to the world whatever."<sup>35</sup>

*Interpretation of the proviso.*—The reasons for allowing the classics and works of recognized literary or scientific merit to be specially handled in the Customs are set forth in the article by Mr. Cairns, who helped Senator Cutting draft this proviso

<sup>35</sup> *Op. cit.*, n. 23 above, pp. 85-87.

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and later was appropriately asked to apply it in actual cases. He begins somewhat optimistically:

"There is no difficulty in distinguishing between those books the impulse behind which is literary and those whose impulse is pornographic. Any man with a modicum of literary knowledge can do so without hesitation. Such a solution, however, does not by any means cover all possible cases. There are special interests of history and biography, of science and art,"<sup>26</sup> which call for special treatment, such as the deliberately pornographic art of the Indians of Central America, which students of that culture must have before them for any full understanding of those people. These cases cannot be brought within the compass of any definite rule, particularly in a field where we are concerned with one of the most complex of human impulses. However distasteful to professional reformers, instances of this type from the legal position should each be approached in the light of its own unique merits."<sup>27</sup>

With respect to the word "classics," no administrative difficulty has been encountered. The phrase "recognized and established scientific and literary merit" has been taken to mean a book which has behind it a substantial and reputable body of American critical opinion indicating meritorious quality. It is not required, of course, that critical opinion be unanimous. Opinions of foreign critics, though persuasive, are not given so much weight. The limitation that the exceptional works may be imported "only for noncommercial purposes" certainly includes matter for public libraries, universities, and museums. I hope that it also applies to purchases by individual scholars and other readers for their own use and not for

<sup>26</sup> Works of art, however, are not mentioned in the proviso. The need for an amendment to include them will be discussed later.

<sup>27</sup> *Op. cit.*, n. 23 above, pp. 87-88.

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resale. The object of the phrase was, I assume, to prevent booksellers from bringing in a number of copies of a questionable book.

### b) PROBLEMS AND METHODS OF SOLUTION

One of the first problems which Mr. Cairns had to face was how to determine American critical opinion. If he does not know it himself, he consults various indexes and the appropriate experts. This practice is especially necessary in the field of medicine, since obscene books are often put in medical disguise. A book which is really scientific comes in easily, in spite of containing obscene elements. Any science will do. Literary works with such elements meet with more trouble under the proviso, but if there are enough American opinions in their support, the Legal Adviser may ask the Secretary of the Treasury to admit them under his discretionary powers.

Special difficulties arise when Mr. Cairns has to pass on a questionable book which is regarded as meritorious in the country whence it came, but anything like it has always been excluded by the Customs as obscene. Consequently, there is no satisfactory body of American criticism about this book to which he can refer.

Some years ago, when a Japanese consul and his wife arrived in this country for a prolonged stay, they brought with them a "pillow-book," which was among their most cherished possessions. It was a beautifully bound set of antique woodcuts of the highest artistic quality, designed for the purpose of bridal education. It is customary in Japan to place such a book beneath the pillow of a bride the night before her marriage. Every publishing house in Japan issues these books for the masses, but this particular set of prints had been handed down from mother to daughter for several generations. The inspector who examined their baggage confiscated the heirloom as obscene.



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Did the law allow the pillow-book to be handed back to its owners? The Japanese do not regard these books as obscene in any way. Their use is supposed to perform a highly desirable function and probably does so in many cases. But the question was not whether this book should be admitted into Japan. The issue was whether it was fit to come where American readers might see it. The pictures in it departed widely from our communal standards. Most people in the United States would undoubtedly consider them very indecent. Under Mr. Cairns's test, they certainly depicted what is "not customarily brought into public view" among us. Consequently, they were the sort of thing that the Act of Congress meant by "obscene" pictures. Could the pillow-book be saved through the discretionary powers of the Secretary of the Treasury? It was not a "classic," and unfortunately the proviso says nothing about admitting works of *artistic* merit. Even if the Legal Adviser could stretch the phrase "scientific or literary merit" pretty far to make it cover obscene pictures of great aesthetic, historical, and sociological interest, he still had to struggle with the statutory requirement that the merit must be "*recognized and established.*" Congress did not tell the Secretary of the Treasury to let in whatever obscene book he (or his Adviser) happened to like. Therefore, in the absence of any American critical judgment for or against pillow-books, the Secretary was not advised to admit this exemplar.

The fate of this antique pillow-book reveals a defect in the proviso as interpreted, which it is hard to know how to remedy. A dilemma is presented. On the one hand, there is a good deal to be said for the present insistence on approval from qualified persons in the United States. If approval at the place of origin were enough, travelers to some country with peculiar standards of decency might be permitted to bring

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back books and pictures which were highly objectionable to most of our citizens. On the other hand, the existing requirement of American recognition has paradoxical results, resembling the timeworn riddle of "Which came first, the hen or the egg?" The book must be let in so as to get adequate American criticism; and yet the criticism here must come first in order to let in the book.

Of course some of these questionable books are smuggled in, but that is no solution. Illicit importations do not get reviewed in the regular way, and the few critics who may happen to mention them are likely to be predisposed in their favor. A black market does not supply a reliable indication of value which can be used in a legal proceeding.

Another troublesome example consists of the writings of Henry Miller, an American expatriate in Paris. If you admit that obscenity exists at all, then he is obscene. Yet some people say that he is our number-one novelist. If Mr. Cairns applied the *Ulysses* test, Miller's works would probably be admitted, for they clearly display the literary impulse as contrasted with pornographic intent. But the test of the effect of the book "as a whole," which is habitually used, does not save Miller's books, because they are obscene as a whole. The proviso is of no benefit to him because favorable reviews by French critics are not the kind of recognition of merit which the Legal Adviser is willing to accept. It has been suggested as a possible way out, that Mr. Cairns could build up an American critical opinion *ad hoc* for a previously banned book by submitting the newly arrived copy to some persons in whose judgment he had confidence. He did this for Henry Miller, but it did not help Miller. Mr. Cairns has given much thought to the perplexities of the Miller case and has always ended by excluding his books.

In drawing the line of obscenity, Mr. Cairns must keep an

eventual court proceeding in mind. Hence he has to predict what a jury will do—he assumes a liberal, enlightened jury. To determine what is “customarily brought into public view,” under his test of obscenity, he makes a point of reading a number of American novels which get by in this country and using them as a standard of the freedom which is given to questionable books under state laws. If a book from outside is no worse than what is left alone inside, then it is not kept out. On the same principle, when the translation of a foreign novel is sold freely in the United States, this novel in French (or whatever its original language may be) gets through the Customs. In fixing his domestic standard of permissible books, Mr. Cairns does not insist that a test novel must never be banned anywhere; he allows for local differences. For example, condemnations in Boston are not controlling for his purposes. In New York, on the other hand, freedom is much greater; he uses a list of books which have been in the state courts there, usually with acquittals. In other words, Mr. Cairns has to form a synthetic judgment of the practices in various states in order to reach and apply the prevailing communal standard as to the proper location of the line between the lawful and the obscene.

No distinction is made in the Customs between the original language and a translation into English or something else. For instance, there is no legal significance in the fact that certain passages in *Boccaccio* are printed in Latin on account of the modesty of the publisher or the translator.

It makes no difference whether a commercially imported book is intended for sale to a large or a small public. (The situation is sometimes otherwise in a criminal court, where a book may get by because issued in a small edition for selected readers, especially if it sells at a high price.) On the other hand, the nature and purpose of the importer are sometimes

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relevant, but only when it is possible to invoke the proviso. Thus a college professor who needs a questionable book for scholarly research, e.g., an essay on D. H. Lawrence, may succeed in getting it in when a large New York bookstore would fail.

Somewhat similar considerations lead me to dissent from Mr. Cairns's very strong reasons for not admitting the Japanese pillow-book.<sup>38</sup> This book (my argument runs) was clearly intended to be seen only by the husband and wife who had long owned it. They themselves would never have brought it "into public view," to revert to Mr. Cairns's definition of obscenity. Except for the action of the government, the book would have remained where it could do no harm. Just as the law protects confidences between husband and wife from being disclosed on the witness stand, so it might have preserved marital privacy in this case. The risk that the cherished heirloom would somehow get into general circulation was much smaller than the risk that a professor who was allowed to import *Lady Chatterley's Lover* for scholarly researches might subsequently eke out his academic stipend by cashing in with a wealthy collector of erotic literature. The danger to American readers from letting the consul keep the pillow-book was negligible in comparison with the invasion of married intimacy caused by its confiscation. I can see that it was difficult to grant to a foreigner the privilege of bringing in a book of a type which would undoubtedly have been seized from the baggage of American citizens returning from Japan; but such a distinction seems warranted by the Legal Adviser's em-

<sup>38</sup> Mr. Cairns's position was that, since there was no body of American critical opinion in existence with respect to this book, there would be no basis for the exercise of the Secretary's discretionary authority. This sound interpretation of the proviso necessarily doomed the book if it was "obscene." The only possible way out is to argue (as I do in the text) that it was not obscene under the very peculiar circumstances. Yet would Mr. Cairns's hypothetical enlightened jury be likely so to hold?

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phasis upon the nature and purpose of the individual importer. Although the Japanese consul and his wife were not entitled to ambassadorial immunity, this book which was so much a part of their lives and would remain so might have been treated as if it were still in a Japanese home. The peculiar circumstances rendered American communal standards inapplicable. For the only eyes which would have seen this book within the United States, it was not "obscene."

### CONCLUSIONS

1. The action of Congress in giving convenient access to a trial before judge or jury, on top of the previous official sifting-out of obscene importations, has had two notable advantages: (a) Whenever the final administrative determination of obscenity is mistaken, it can now be corrected by an impartial tribunal of the sort traditionally intrusted with the task of drawing the line between lawful and unlawful publications. (b) What is more striking, the apprehension of reversals in court has brought about improvements in the administrative mechanism, which have reduced official mistakes to such an extent that no final decision in the Customs has been contested by an importer for twelve years. One can almost say that intelligent anticipation of the possibility of court review has eliminated any need for court review in fact.

These two advantages strongly support the retention of judicial proceedings to review official action in the Customs Service. They also deserve consideration in connection with administrative censorship which is not now subject to judicial review, e.g., as to mail and (in some states) as to motion pictures.<sup>29</sup> The question, then, is whether these advantages are outweighed by special objections.

<sup>29</sup> *In the Matter of Goldwyn Distributing Corp.*, 265 Pennsylvania Reports 335 (1919).

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2. Whether the law provides for court proceedings or not, the public benefits in many ways when any administrative mechanism concerned with the regulation of communications is carefully organized so that it will sift out unlawful material as wisely as possible. The example of Mr. Cairns in the Customs proves that it is sometimes possible for the official who makes vital decisions about obscenity to act as impartially as a judge and, in addition, to possess a training and an understanding of the specific problems which are rare among judges. Such qualities in a censor save much time, trouble, and expense for the Department as well as for importers, eliminate all sorts of resentments, and cause his adverse rulings to be promptly accepted. This last effect avoids many court contests, when the law allows them. And a reader who wants to obtain a single book is usually unwilling to go to court, so that he is especially entitled to painstaking and just official treatment.

3. It is important to ask whether the present excellent operation of the administrative mechanism in the Customs for disposing of obscenity cases is wholly dependent upon the unique personality of the Legal Adviser who now makes the vital decisions. If there has to be censorship, Mr. Cairns is the ideal censor. Yet, unless some of the factors which have produced his success are communicable to less talented men, the progress which I have been describing is only an isolated and temporary affair. Mr. Cairns can do only one out of several censoring jobs in the United States, and he will not do that job forever. Men with anything like his qualifications for solving problems of literary and artistic freedom are hard to find and unlikely to want to be censors. Fortunately, over and above his own participation in the individual cases, Mr. Cairns has brought to his work at the Customs methods and attitudes

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which can be adopted by his successors and also by those engaged in other forms of censorship.<sup>40</sup>

4. The Customs Bureau is unable to deal satisfactorily with art, because the proviso as it now stands mentions "literary or scientific merit," but says nothing about *artistic* merit. If a great art museum should purchase abroad certain of the drawings of Leonardo da Vinci for use by American scholars, the existing law would require the seizure and destruction of these irreplaceable expressions of his strange genius. Congress can safely trust the Secretary of the Treasury to know when to admit such material under proper conditions. An amendment of the proviso is needed to give art as much freedom as literature and science. This desirable purpose might be accomplished by inserting a few words (*italicized below*) in the forfeiture statute so as to make it provide:

"That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books *or other works*<sup>41</sup> of recognized and established literary, *artistic*, or scientific merit, but may, in his discretion, admit such classics or books *or works of art* only when imported for noncommercial purposes."

5. Much difficulty has arisen in the operation of the proviso (as already explained) when an imported work with obscene elements is highly esteemed by competent persons abroad but the Legal Adviser can find no body of American criticism about it. An amendment to solve this problem is very hard to frame, but I venture to set forth a few reflections about the interpretation of the statutory phrase "recognized and established." These views do not, I think, differ from the present

<sup>40</sup> See the passage from the Acheson Monograph on the Post Office, quoted below, pp. 348-49.

<sup>41</sup> Since the proviso now seems to apply only to books, some such phrase as this is advisable in order to make it plain that pictures, sculpture, etc., are within the discretionary powers of the Secretary of the Treasury.

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practice of Mr. Cairns, who regards the opinions of foreign critics as persuasive. Yet what is said here may be helpful in connection with future applications of this legal standard by other censors.

My main idea is that the words "recognized and established . . . merit" do not indispensably require American recognition of *the book*, but that foreign criticism may properly be accepted as a substitute when there is American recognition of *the foreign critics*. Suppose that a new English treatise on mental hygiene ordered from abroad by a New York psychiatrist and a new French novel brought home by a California professor just discharged from army service in Europe are both detained in the customs because of several obscene passages. American criticism is inevitably lacking. However, in England where the standards of decency are as strict as those of Boston, the psychiatric treatise was very favorably reviewed in several leading medical journals, and the French novel received a full page in the *Times Literary Supplement*, which called it one of the great books of our time and almost in a class with *Anna Karenina*. It seems to me that both these books may lawfully be returned to their owners as having "recognized and established literary or scientific merit" within the meaning of the proviso.<sup>42</sup> I agree that recognition anywhere is not enough, for instance, if an erotic book was praised by the "advance guard" in its country of origin just because of its vivid portrayal of matters very shocking to an American and for no other reason. But recognition abroad is a fair equivalent for recognition here when the foreign critics (as in the British journals I mentioned) are as much aware of considerations of decency as American critics.

<sup>42</sup> Mr. Cairns's article (cited above, n. 23) speaks of the admission of an English medical book somewhat on this ground.



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Their standards, both as to meritoriousness and as to obscenity, are comparable with our standards. Their balancing of good and bad qualities is entitled to our confidence. When British reviewers, for example, appraise a book as valuable to British scientists, despite its obscenity, an American specialist in the same science knows that it is valuable to him. When foreign critics are much like American critics and their opinions carry great weight with American critics and other experts in the field, they may rightly carry weight with the Secretary of the Treasury and his Legal Adviser. This is particularly true when there is also a close resemblance between readers in their country and readers in the United States.

The basic issue under the proviso is not, of course, the fitness of the book for readers abroad. The basic issue is its fitness for American citizens, particularly the person who has imported the book for noncommercial purposes and other persons who are likely to have access to it after it is in this country. My point is that foreign criticism is relevant to that issue, when both the critics and their readers look at the book the way Americans would look at it. Any book which has been strongly recommended to a certain class of British readers, let us say, is likely to be equally fit for a corresponding class of American readers. And that is just what the Secretary of the Treasury needs to know in order to exercise his discretion to let them get the book.

6. The requirement of the forfeiture statute that whatever is refused entry "shall be destroyed" should be amended so as expressly to permit the alternative use of milder penalties when appropriate. Some things ought to be preserved for the sake of literature, science, or art. Capital punishment for obscenity is well enough for Parisian post cards and other pornography in mass production, but how about an almost

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unique copy of the first printed edition of an outspoken Latin classic brought in for resale? The commercial purpose puts it outside the mercies of the proviso, and the statute itself does not plainly offer any other reprieve. I should enjoy watching the Supreme Court struggle to decide that a bookseller's 1609 quarto of Shakespeare's *Pericles* was not obscene, in order to save it from the Treasury's incinerator.

It is true that there is at the present time a lawful way of preserving condemned art and literature for the benefit of scholars, if the official in charge cares enough about such matters to make use of it. An established administrative interpretation of the forfeiture statute provides that, when books and articles have been voluntarily forfeited without judicial proceedings, they may be delivered to the responsible head of a federal agency for whose work the article would have value if such a person requests them. Moreover, several condemned indecent books have been, by court order, deposited in the Library of Congress. On the basis of the foregoing administrative practice and judicial procedure Mr. Cairns has been able to avoid destroying what ought to survive. Thus a Chinese ivory tusk elaborately carved with erotic figures during the twelfth century, although ruled to be outside the proviso, was deposited in a government repository.

Yet some successor of Mr. Cairns may have less initiative or overlook such possibilities. Hence it would be very desirable for Congress to clarify the procedure just described by specific language in the forfeiture statute and to authorize similar deliveries to nonfederal institutions such as museums of recognized standing.

A good solution is to use the analogy of the present proviso and give the Secretary of the Treasury discretion to refrain

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from destroying a condemned book or work of art whenever he finds good reasons for its preservation. Although I should prefer not to limit his discretion, Congress may want to specify the reasons. If so, these should include literary, artistic, or scientific merit, as in the present proviso, but omit any requirement of importation for noncommercial purposes. It would be silly to prevent a first edition from going into the carefully locked collection of obscene books in the Library of Congress merely because it was brought in for the profit of the bookseller who will never see it again. He is out of the picture. The object of the proposed amendment is to preserve a unique book or work of art for its own sake and the benefit of scholars.

Whenever the Secretary rules against destruction, the law should direct him to dispose of the condemned object in some other suitable way. Here again I should prefer the statute not to be specific. So long as the obscene matter is not allowed to get into general circulation within the United States, it would be well to give the Secretary a wide choice because there are many ways in which he can prevent that harm besides total destruction. He can place the object in a national library or museum. He can return it to the country of origin if the government there consents. A cherished possession, like the Japanese pillow-book, which is brought in by a visitor to this country, can be impounded and returned to its owner after he embarks for his home. The best way to check possible abuses of power by the Secretary is not to tie his hands by the statute but oblige him to go to the court which condemned the importation and get an order for the particular disposition which the Secretary desires. This gives the judge an opportunity to disapprove of an unwise course of action.

An amendment to prevent the destruction of rare books

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and unique works of art in spite of decisions that they are obscene is especially desirable because of what I said earlier about the fluidity of our conceptions of obscenity. A glance at photographs of women's bathing suits in previous decades abundantly proves that those conceptions are likely to alter as time goes on; just how, we do not know, but we can be sure that much which seems very indecent to some men today (including able judges) will probably not seem so to other men a hundred years hence. They may think that scholars and perhaps citizens generally can gain much benefit from looking at the Japanese pillow-book or the Chinese carved tusk or other irreplaceable things which were condemned by congressmen, officials, and courts in the middle of the twentieth century. If that happens, our condemnation will not prevent them from getting whatever good they desire from these books and works of art, so long as we merely sequester them from public gaze. Destruction, however, which is what the existing statute says, makes all future usefulness impossible. Already Ruskin is sorely blamed for tearing up many of Turner's drawings because he thought them shocking, and we bitterly regret the zeal of devout missionaries in doing away with every scrap of Maya writing, which might now enable us to understand the language and history of the most civilized of our precursors in North America. Do we want our descendants to speak of us as misguided vandals? When the artistic, literary, and scientific merits of importations seem to us outweighed by the harmfulness of their presentations of sex, the law will give us enough protection when it is changed to put these books and objects in places where their harmful qualities do us no harm, leaving open the possibility that their meritorious qualities will some day do other men good.

## CONTROL OF POST OFFICE OVER OBJECTIONABLE PUBLICATIONS

**T**HE Post Office brings the government into the communications field actively and in a way which differs from its other interventions. The government is not primarily concerned with stopping objectionable traffic (as when it punishes sedition) or with encouraging and keeping in smooth operation the traffic of others (as when it distributes radio frequencies to private broadcasting stations) or with sending and receiving news itself (like the Office of War Information). The outstanding feature is that *the government operates the medium itself*, mainly for the benefit of private persons, although there is a large volume of government mail. The government is a carrier of letters, newspapers, magazines, and books, just as a railroad is a carrier of coal and other kinds of freight.

### THE POST OFFICE AND FREEDOM OF THE PRESS

The Post Office cuts across our threefold classification of governmental effects on the press. It can be said to involve all three powers. Practically, the Post Office spends most of its time doing what is very close to encouraging traffic—here its own traffic in order to facilitate the communication of ideas. This is so old a government function that we take it for granted, forgetting how letters and newspapers had to be distributed by private messengers, obliging ship captains, etc.,

before the government Post Office was instituted. Now the government is busy widening the channels by introducing pneumatic tubes, air mail, etc. It also sends and receives its own mail. But these two aspects of the Post Office raise no troublesome problems for this book.

We concentrate our attention on the first or restrictive function, although this is a very small part of the work of the Postmaster General and his subordinates. As a slight incident to his business of carrying a great many things, he is forbidden by law to carry a few things at all because of the objectionable nature of the ideas therein. Also the law (as interpreted by the Supreme Court) says that the prices he charges for transportation may be affected on certain rare occasions by objectionable ideas. Here again the fact that the government operates the medium becomes significant. When the government prosecutes a bookseller for selling *Strange Fruit*, it is telling somebody else what he must not do in his business; but, if it excludes *Strange Fruit* from the mails, it is saying what it will not do itself in its own business. This coincidence of the law-maker and the medium facilitates a belief on the part of officials that postal restrictions are entirely different from other interferences with freedom of communications and fall outside the prohibitions of the First Amendment. In other words, the theory is that Congress possesses or may delegate unlimited power to determine what can be mailed and for what price. The use of the mails is not a right but a favor, which can be granted or withheld at the will of those in charge, just as the captain of a clipper ship from Salem was completely at liberty to decide whether he would take a letter from a rival merchant in Boston to the latter's agent in Canton.

Is this theory sound? This is an important question, because if sound it makes postal transmission the Achilles heel

## THE POST OFFICE

of communications, vulnerable to any sort of governmental interference. Even an official who would not press the theory to extremes may be noticeably influenced by it in his attitude toward any postal problem affecting news and opinions. He may push suppression or discriminatory burdens in the mails beyond the governmental control exercised over publishing and sales. Publications may be black-listed for postal purposes which no sensible district attorney would think of subjecting to prosecution (state or federal). This is true of several books suppressed by Postmaster General Burleson in the first World War;<sup>1</sup> no prosecution was brought anywhere and convictions were highly improbable. The idea is that the officials, on this theory, do not feel that they are interfering with free speech. They do not think that they are censoring. They are just withholding or classifying privileges. As members of the government they are settling by congressional authority how the government shall spend its own money and run its own affairs. They do not see why the government is under any obligation to help private citizens distribute what they regard as injurious publications. They want to help people who deserve help. The government does not have to carry any particular kind of mail. For a long time it did not carry parcel-post packages, but now it does. Conversely, it can drop what it used to carry or refuse new items. According to this view, the postal officials are free (within their statutory authority) to manage the mails in any way which seems best to them.

Are postal restraints on the communication of facts and ideas exempt from the constitutional protection given to freedom of the press? My answer is "No." The plausible theory

<sup>1</sup> See FSUS, pp. 97-99. Some prosecutions for periodicals he stopped were successful, e.g., against the editors of the *Masses*. The conviction of the editors of the *Milwaukee Leader* was reversed. The *New York Call* was stopped but not prosecuted.

## POST OFFICE AND FREEDOM OF PRESS

outlined above is mistaken. The First Amendment says: "Congress shall make no law . . . abridging the freedom . . . of the press." It does not say "no law except postal statutes."

When President Jackson in 1836 urged Congress to check the circulation of Abolition pamphlets and newspapers in the South by passing a law prohibiting the use of the mails for the transmission of publications intended to instigate the slaves to insurrection, Congress refused. The Senate committee report, written and presented by John C. Calhoun, relied on the First Amendment and emphasized the extent of the control over the press which would be given to the government if it had the right to prohibit circulation through the mail. Calhoun said, after pointing out that statutes had closed all channels except the mail to letters:

"Like provision may be extended to newspapers and pamphlets; which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties. The mandate of the Government alone would be sufficient to close the door against circulation through the mail; and thus, at its sole will and pleasure, might intercept all communication between the press and the people. . . ."<sup>2</sup>

Although the Supreme Court has never invalidated a postal statute, it has more than once intimated that the postal power is not unbounded. In the most recent case on the Post Office, Justice Douglas said for the Court:

<sup>2</sup> *Works of John C. Calhoun* (1857), V, 194-95, quoted by Justice Douglas.



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But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated.<sup>3</sup>

An important analogy is found in *Hague v. Committee for Industrial Organization*, decided by the Court in 1939.<sup>4</sup> This also involved a long-recognized governmental business, the ownership and operation of streets and parks, which is much older than any public postal service for private benefit. The Jersey City officials in charge of the street and park business were allowing some groups to hold public meetings in such areas and denying permits to other groups whom they considered objectionable. This discrimination was expressly authorized by legislation (a city ordinance). The city's theory was that speaking in streets and parks was not a right but a favor which could be refused in the discretion of the authorities. Notice the resemblance of this reasoning to the view that the federal government may freely refuse to let objectionable persons use the mails or use them at less than cost. The city's reasoning was rejected by the Supreme Court. Justice Roberts said, in language which *mutatis mutandis* can be applied to the mails:

. . . streets and parks . . . , time out of mind, have been used for purposes of . . . communicating thoughts between citizens and discussing public questions. Such use . . . has, from ancient times, been a part of the . . . liberties of citizens. The privilege of a citizen . . . to use the streets and parks for the communication of views on national questions may be regulated in the interest of all; it . . . must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

<sup>3</sup> *Hannegan v. Esquire*, 327 United States Reports 146 at 156 (1946). See also *Ex parte Jackson*, 96 United States Reports 727 at 733 (1877).

<sup>4</sup> 307 United States Reports 496 (1939). See FSUS, pp. 409-30.

If a city government was not allowed to manage its own business at the sacrifice of "freedom of assembly," then the federal government, it would seem, is under a constitutional duty to run its postal business with due regard to "freedom of the press." Consequently, there is good reason to believe that the postal power is not outside the protection of the First Amendment and that the Supreme Court will step in whenever interference with the communication of ideas through the mails goes beyond what the Court considers proper limits.

The Court will, I think, be somewhat more reluctant to upset postal restrictions on discussion than criminal convictions for speaking and writing. Here the fact that the postal service is a great and complicated business does have significance. The Supreme Court cannot run the post offices, but it can to a considerable extent run the lower federal courts and, in some measure, the state courts. In judicial matters the Justices know their way around—"born and bred in a brier patch." They are well aware of the consequences of reversing a decision below. They can go far because they are well acquainted with the precise point where they ought to stop before going too far. Whatever new views the Supreme Court lays down will be carried out by judges in a way the Court well understands. It is quite otherwise if the Court upsets a ruling by the Postmaster General, especially if the ruling represents an habitual practice and not just an isolated case. It cannot foresee all the results of a sharp change in practice. The Justices cannot sit down and consult with the Postmaster General how best to shape out a new routine—that is not the way a court works. Nevertheless, all these reasons for caution may not prevent the Court from upsetting a postal restriction which outrages the high valuation placed by the present Justices upon open discussion. The Supreme Court could not run Jer-

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sey City, but its judges got stirred up enough to tell Mayor Hague how *not* to run it. They may tell a Postmaster General how *not* to run the mails.

The effect of the First Amendment and freedom of the press upon the administrative mechanism of the Post Office is more important practically than their effect on the postal power of Congress. Questions of the unconstitutionality of legislation are somewhat remote from reality, because the existing postal statutes, if properly construed, seem to fall within the valid powers of Congress.<sup>5</sup> At all events, the Supreme Court will be slower to upset an express statutory rule which prohibits mailing certain matter than a rule made by the Postmaster General interpreting a statute. The Court will, of course, respect a high administrative official, but it does not defer to him in the way it does to Congress. And construing federal statutes is definitely the Court's job. Whenever it considers an order of the Postmaster General for the retention of mail or the denial of second-class rates, the Court has to interpret the statute on which he relied and ascertain whether he was right in thinking that it covered the case; if the Court decides that he interpreted the statute incorrectly and was acting outside its true scope, then he was acting unlawfully. In that event, this high official is just as responsible as any private citizen for infringing the property rights and liberty of the person whose mail was injuriously affected.<sup>6</sup> The Court will direct him to undo his wrongful action by restoring that mail to the ordinary channels.

<sup>5</sup> The only possible exception concerns the birth-control provisions, which might conceivably be upset some day if opinions on that subject undergo a change. The view of some writers that all postal censorship is unconstitutional is to me a pipe dream.

<sup>6</sup> *American School of Magnetic Healing v. McAnnulty*, 187 United States Reports 94 at 109-10 (1902).

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All this means that the Supreme Court uses freedom of speech and the press, not merely to upset an occasional bad statute, but also as a guide for interpreting many good statutes. The Court is reluctant to nullify legislation; it prefers, when possible, to treat the statute as valid and ask whether it was construed too broadly. Did the statute support the particular restriction which some official (or lower court) imposed on the communication of information and ideas? Two choices are then open to the Court: (1) It may say that what the official mistakenly did could not have been constitutionally authorized by Congress; the statute *as applied* violates freedom of the press, but not when properly interpreted. (2) The Court is more inclined to hold that a broad statute should not be used to impair this precious liberty in borderline cases. If Congress had intended to cut down this kind of discussion and plainly said so, perhaps such a statute would stand; but Congress did not say so, and the Court will therefore assume that Congress did not intend such a restriction. An administrative official may thus be discouraged from outrunning his explicit orders in the field of free speech. This, as we shall see, was the basis of the *Esquire* case.

Let me use two rather fanciful examples to illustrate what I have just been saying. (1) If the Postmaster General should echo the prejudices of some of our ancestors and rule that all love stories were "obscene" and hence nonmailable, the Court would overrule him because not even an express statutory provision outlawing love stories would be valid. (2) On the other hand, Congress probably has power to amend the postal statute by adding that obscenity shall be interpreted to include any picture of a woman who is unclothed between neck and knee. I doubt whether the criminal law in any state applies such a test, but the Court would probably uphold the

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Act and might say that judges must not profess to have greater knowledge of the possibilities of undesirable sexual stimulation than senators and representatives. Suppose, instead, that "obscene" in the statute as now worded were interpreted by the Postmaster General to include such displays of nudity approaching a limit. I think that the Court might upset such an administrative extension of the unmailable. It might regard this as a matter for Congress, not him. At any rate, it would seem to be a good working principle for the postal officials not to push restrictions beyond well-recognized criminal boundaries except when Congress has plainly told them to do so.

The preceding discussion is, of course, wholly at variance with the plausible theory with which I opened—that the postal service is operated as a favor and can be controlled by the government just as it wishes. Some day I believe that the Supreme Court will squarely repudiate this theory. But judicial action in the postal field is so infrequent that years may elapse before that happens. It would be much more satisfactory if the postal officials would soon abandon this old theory of their own accord and adopt instead a coherent and workable conception of their functions, which would recognize both their duty to safeguard the public and their obligations to promote a maximum measure of communication.

Presumptuous though it be, I venture to offer such a conception:

1. **Facilities for the communication of ideas and news are vital to any modern society, and in a free society it is essential that restrictions on the flow of news and ideas in any channel should be kept at a minimum. This principle has been recognized by the Supreme Court in numerous decisions upsetting criminal convictions. The postal service is one of the most im-**

portant channels of communication. The principle enunciated by the Court is just as applicable to the Post Office Department as to the Department of Justice, to the distribution of printed matter as to its getting printed. The postal power, like any other federal power, is subject to the First Amendment. The exclusion or hindering of any mailed matter by administrative action is a form of censorship, even though it be constitutional censorship.

2. In operating this important channel, the federal government is not conferring favors but serving society. Although it is not strictly a common carrier, it is in the nature of a public service company. It is doing what has been done by private persons and corporations in the past. Over the carriage of letters it has a monopoly. It should behave like any other conscientious public utility monopoly. When the government furnishes services to its citizens for pay, it should conform in general to the standards applicable to other public utilities. A state is not obliged to run a law school—it may leave that to private enterprise; but if the state does go into the legal education business, the Supreme Court held that it must not accept only white customers.<sup>7</sup> If the federal government should take over all the railroads, it ought not to make unreasonable discrimination among passengers and shippers any more than a private railroad corporation; and a somewhat similar limitation should apply to the postal power. A closer parallel would be government operation of all broadcasting stations, because they are a medium of discussion like the mails. An adverse decision by the Postmaster General excluding or burdening a periodical or book not only hurts the publisher's business like a railroad's refusal to transport, or imposing high charges for freight; it also lessens the readers'

<sup>7</sup> *Missouri ex rel. Gaines v. Canada*, 305 United States Reports 337 (1938).

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chances of learning what is said. The postal service should be very reluctant to impair the interchange of news and ideas.

3. This does not mean that there should be no statutory limits on the use of the mails. Congressional regulations banning really filthy publications and lottery tickets may be considered reasonable regulations in view of the nature of the service, like railroad rules excluding drunks and dynamite from trains. As with any other public utility, the general obligation of service is subject to reasonable exceptions, and rates may be varied on a reasonable basis.

4. The importance of the Post Office as a channel for public discussion through which right opinions are formed and right decisions made by voters and by the government is the first thing to be remembered whenever postal restrictions on news and ideas are under consideration. It is the biggest factor in testing what regulations are reasonable. Statutes should not interfere with this basic service by authorizing exclusions and discriminations except for very strong reasons. They should be as explicit as possible. Such discretion as is necessarily left to officials should be exercised with the same purpose in mind. The selection of the officials who decide and their procedure should be shaped to fulfil this purpose as well as the obligation to protect society. The official's conviction that the publication is objectionable should be tested by the belief that the freer the discussion, the better can society decide what is objectionable and what is the right way to get rid of it.

### TWO POWERS OF THE POST OFFICE TO IMPAIR FREEDOM OF COMMUNICATION

Examination of the Post Office is complicated by the fact that it can interfere with the press in two ways, which are quite different and yet tangled up with each other. Both must

## TWO POSTAL POWERS OVER COMMUNICATION

be studied; it is hard to keep them separate, and it is confusing to consider both together.

A brief description of the two powers without reference to legal details may help. First, the Postmaster General is empowered to exclude altogether certain classes of objectionable matter, for example, obscenity, which it is also made a federal crime to mail. Second, an entirely distinct statute provides four classes of rates for different kinds of mail, granting the lowest or second-class rate to periodicals if they fulfil certain specified requirements; and it empowers the Postmaster General to withhold or revoke the permit if he finds that the publication fails to comply with these requirements. The relation of the exclusion power to freedom of communication is obvious, but that of the second power requires further explanation. The statutory requirements of second-class periodicals make no specific reference to objectionable contents as a bar. However, the Department has taken the position (sustained by the Supreme Court) that the presence of matter non-mailable within the other group of statutes justifies him in revoking the second-class rates; and in the *Esquire* case Mr. Walker tried to extend this power to apply to other objectionable matter.

Therefore, the contents of a publication may result either in its being thrown out of the mail altogether under the first power or in its getting carried thereafter only at much greater cost. Some practical differences between these two penalties for undesirable subject matter may be listed:

1. Offhand, exclusion seems to be more severe. It means that the publication cannot be mailed at all. It must be sent out by express, etc., subject to possible federal criminal penalties for interstate transportation, perhaps not a serious matter when the exclusion from the mails is on controversial grounds.



## THE POST OFFICE

Reclassified publications can still use the mail, though more expensively.

2. Reclassification may, however, be much more damaging in the long run because it affects all future issues of the periodical, until it can once more get into the good graces of the Postmaster General. The increased expense is great (eight to fifteen times the rates for second-class mail). Exclusion simply hits one issue. Hence the list of subscribers will probably not be shot to pieces or finances greatly burdened.

3. Exclusion applies to both books and periodicals. Reclassification is limited to periodicals. *Strange Fruit* may be excluded; *Esquire* was denied second-class rates by the Postmaster General.

4. Exclusion requires speedy administrative decision. The item must be stopped at once, if at all. The usual delays of an oral trial (or hearing), briefs, appeals, etc., are inappropriate. Reclassification, since it affects the future and not what is already in the mailbox, admits of a fuller consideration of evidence and arguments. However, with a daily or a weekly, the time will still be short if the Postmaster General is insistent.

5. Hence it is natural that the exclusion statutes do not require a hearing, and usually none seems to be held. The Reclassification Act does require a hearing before the suspension or annulment of second-class mail privileges;<sup>8</sup> this is held if desired by the owners of the periodical.

Now I shall take up the two powers<sup>9</sup> in detail and consider the problems raised in each.

<sup>8</sup> 39 United States Code, sec. 232.

<sup>9</sup> A different power over the mails, exercised by the censor in wartime, is considered elsewhere in connection with the whole problem of war censorship. Both Mr. Creel and Mr. Price were independent of the Post Office Department, although Mr. Creel used postal clerks in his work (see chap. 17).

## EXCLUSION FROM THE MAILS

### ✶ EXCLUSION FROM THE MAILS

This power prevents mailing at all and applies to books, pamphlets, etc., as well as to newspapers and magazines.

#### WHAT IS NONMAILABLE?

Four different existing statutory grounds for declaring matter nonmailable affect the communication of news and opinions:

1. *Sedition broadly—prospective interference with the safety and operations of the national government.*—This includes any matter violating the Espionage Act (applicable only in war-time), or advocating treason, insurrection, or forcible resistance to any law of the United States.<sup>10</sup> The most frequent basis of exclusion has been violation of the Espionage Act. Postmaster General Burleson was very active during the first World War against both books and periodicals.<sup>11</sup> In the only case known to me during the recent war, this Act was used to ban Father Coughlin's *Social Justice* issue by issue.

2. *Obscenity.*<sup>12</sup>—"Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character," is declared by Congress to be nonmailable. This statute is often invoked, and the ensuing discussion will be largely devoted to its problems.

3. *Information about birth control.*<sup>13</sup>—Although the statute

<sup>10</sup> 50 United States Code, secs. 33, 34; 18 *ibid.*, secs. 343, 344. This was first enacted in 1917 (see chap. 16). Its sole peacetime use was upheld by *Gillow v. Kiely*, 44 Federal Reporter, 2d Series, 227 (N.Y. 1930). So far as I know, the peacetime Sedition Act (Alien Registration Act) of 1940 is not applicable to the mails. See FSUS, pp. 440-90. Compare the abortive sedition bills of 1919-20 (*ibid.*, p. 169). See also below, chap. 14.

<sup>11</sup> FSUS, pp. 42-51, 97-99.

<sup>12</sup> 18 United States Code, sec. 334. This was first enacted in 1872.

<sup>13</sup> *Ibid.* This became part of the obscenity statute in 1874.

treats such information along with birth-control devices as one type of obscene matter, this begs the question. The considerations are quite different from those presented by pornographic post cards or *Lady Chatterley's Lover*. However, the whole subject raises so many problems outside the scope of this book that it will not be discussed at all.

4. *Matter tending to incite to arson, murder, or assassination.*<sup>14</sup>—This provision needs no further attention because it is rarely used. (I have already spoken of the difficulty caused by anti-Semitic literature in the Customs.)<sup>15</sup>

The statutes direct that any nonmailable matter shall not be conveyed or delivered by the postal officials, and they impose heavy penalties upon the person mailing it. When detained, it is disposed of as the Postmaster General may direct.<sup>16</sup> Destruction is the usual fate of obscene publications. Sometimes he orders books or magazines returned to the sender. This happened to the issues of the *Masses* which were held in 1917 to violate the Espionage Act.<sup>17</sup>

If a wary publisher of possible obscene publications decides to distribute them by express or other methods of interstate transportation so as to avoid trouble with the Post Office, he is still punishable under the federal criminal law.<sup>18</sup> This also applies to whatever violates the Espionage Act and to some other kinds of nonmailable matter, but not all kinds. However, there is no administrative censorship of interstate transportation outside the mails; and in the case of a border-line novel the publisher may think that the practical risks of a federal prosecution and conviction are small.

<sup>14</sup> *Ibid.* Since 1911 Congress has declared that this matter is excluded within the term "indecent" in the obscenity statute.

<sup>15</sup> Above, p. 250.

<sup>16</sup> 39 United States Code, secs. 243, 258.

<sup>17</sup> FSUS, pp. 42-51.

<sup>18</sup> 18 United States Code, sec. 396.

## EXCLUSION FROM THE MAILS

Mention should be made of two other grounds of nonmailability, one actual and the other recently brought before Congress:

5. *Fraudulent mail* (e.g., solicitation of money for worthless enterprises like recovery of Sir Francis Drake's fortune or the Spanish prisoner's hidden gold).—Charities where all the donations go into the solicitor's pocket are a frequent example. Here the Post Office has unusually powerful machinery, for it can reach *incoming* mail, whereas the other grounds stop only *outgoing* mail dispatched by the supposed offender. A fraud order results in the return to the senders of all letters addressed to the person or corporation which has been found to be fraudulently using the mails.<sup>19</sup> This power relates primarily to sales talk, which this book has marked off from discussion.<sup>20</sup> Hence it probably need not concern us, although it may conceivably affect opinions, especially religious opinions. Suppose funds are solicited for a sect which seems to most of us absurd. For example, a prophet mails out circulars that the world is going to end on April 1, 1948, so that the best thing to do is to sell your property while you can and donate the proceeds to the prophet, who will repay you with blissful companionship in Paradise. Would a fraud order or a prosecution for using the mails to defraud violate religious liberty in the First Amendment? Is the prophet's sincerity a triable issue? The Supreme Court had to consider a somewhat similar question recently, and the views of the various Justices are extremely interesting.<sup>21</sup>

<sup>19</sup> 18 United States Code, secs. 338, 339; 39 *ibid.*, sec. 259.

<sup>20</sup> Above, p. 25.

<sup>21</sup> *United States v. Ballard*, 322 United States Reports 78 (1944). It is also significant that in *Leach v. Carlisle*, 258 United States Reports 138 (1922),

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6. *Group libel*.—Group libel is not yet a nonmailable class, but in discussing that subject I spoke of a bill in Congress which gives the Post Office power to exclude anything which defames a religious or racial group. There is a tremendous latitude in such a bill if it passes. An official might conceivably ban a discussion adversely criticizing the foreign policy of the Vatican or opposing the repeal of Jim Crow laws or poll taxes. What has already been said about the difficulties of controlling group libel by law applies with especial force to this proposed expansion of postal censorship.<sup>22</sup>

### THE LIKELIHOOD THAT POSTAL CENSORSHIP WILL CONTINUE

The two grounds of nonmailability which chiefly concern us—the Espionage Act and obscenity—make it possible for the Postmaster General and his subordinates to repress political thought in the name of loyalty and hamper literature and art in the name of decency. There is something comic in our placing this great power in the hands of the most politically minded member of the Cabinet, who is traditionally the party campaign manager and preoccupied with ballot boxes as much as letter boxes. The obvious danger of his control over the contents of publications is pointed out by many critics, one of whom says:

“In a country where the will of the majority is constitutionally estopped from erasing the opinion of the minorities, the printed word is subjected to official scrutiny on two fronts, obscenity and radicalism. . . . Before the written idea may pass from the thinker to the people, it must be judged by the appointee of the political majority. . . . As a practical

Justices Holmes and Brandeis pointed out the harmfulness of denying a court review of the facts in fraud cases (see FSUS, p. 300).

<sup>22</sup> See above, chap. 5.

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matter, therefore, the most extensive medium of communication may be dominated by a very few men."<sup>23</sup>

Here is previous restraint, which even Blackstone denounced.<sup>24</sup> Yet neither Congress nor the Supreme Court seems inclined to do away with these two grounds of postal censorship. The seizure of disloyal mail matter in war is considered necessary to national safety. The occasional condemnation of notable books or magazines as obscene is tolerated because the abolition of this law would take away the best check we have on commercialized pornography. The criminal law alone would be too slow and uncertain to cope with mass production of filth.

Since these nonmailable statutes are therefore likely to be with us for many years, it will be profitable to pass over questions of their constitutionality and concentrate our attention upon the possibilities of making them work as satisfactorily as possible. The first step is to ascertain what happens now in Post Office exclusion cases. Although postal officials define obscenity and violations of the Espionage Act just as the criminal courts do,<sup>25</sup> we have repeatedly seen the importance for free communications of learning who locates the boundaries of such wrongs and by what methods. Consequently, after surveying the grounds for denial of second-class rates, I shall examine the actual operation of both kinds of postal control over objectionable publications.

<sup>23</sup> Kadin, "Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting," 19 Boston University Law Review 533 at 548 (1939). See also Schroeder, "On the Implied Power To Exclude 'Obscene' Ideas from the Mail," 65 Central Law Journal 177 (1907); Deutsch, "Freedom of the Press and of the Mails," 36 Michigan Law Review 703 (1938). On postal control of books see Curtice Hitchcock, quoted above, pp. 207-8.

<sup>24</sup> Above, p. 71.

<sup>25</sup> See above, chap. 10, and below, chap. 16.

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### CONTROL OF NEWS AND IDEAS THROUGH THE DENIAL OF SECOND-CLASS MAILING RATES

A peculiar feature of this power is that it is not given by the specific language of a statute, but is derived from judicial and administrative interpretation of legislation which is directed toward a purpose quite distinct from the discouragement of objectionable news and opinions.

#### THE POSTMASTER GENERAL'S POWER AS STATED BY CONGRESS

The Mail Classification Act of 1879<sup>36</sup> provides four classes of postal rates for different kinds of mail. Second-class rates are granted to periodicals which fulfil four requirements. These rates are far lower than for any other class of mail and are stated by the Postmaster General to be considerably below the actual cost of carriage, so that granting them amounts to a government subsidy to the periodical in question.<sup>37</sup> The four statutory requirements are: (1) Issued at stated intervals, at least four times a year, with a date and consecutive numbering. (2) A known office of publication. (3) Printed and

<sup>36</sup> This is now 39 United States Code, secs. 221-27.

<sup>37</sup> "Second-class mail has, as a matter of public policy, probably been carried at a loss. The term 'probably' is used because of the complicated and difficult cost ascertainment procedures used by the Department to apportion its expenditures among the various classes of mail. Since the same post offices and carriers and transportation vehicles handle all classes of mail, there is always an arbitrary element involved. . . . According to the estimates of expenditures now used by the Post Office, only one-fifth of the cost of carrying revenue-producing second-class mail was met by revenues in 1945 . . . the greatest dollar loss was the 40 million dollar deficit in carrying daily papers, followed by about 30 million dollars lost in carrying 'non-newspaper' publications the bulk of which are magazines" (*Survival of a Free, Competitive Press: Report of the Chairman to the Members of the Special Committee To Study Problems of American Small Business, United States Senate* [80th Cong., 1st sess.; Senate Committee Print No. 17 (January 2, 1947)], p. 49).

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not mimeographed, etc., a periodical and not bound so as to be a book. (4) "It must be originated and published for the dissemination of information of a public character, or *devoted to literature, the sciences, arts or some special industry,*" have a legitimate list of subscribers, and not be designed primarily for advertising purposes or free circulation.<sup>28</sup>

The Postmaster General may withhold or revoke the permit if he finds that the periodical does not fulfil the requirements of the Act. Actual examples are findings that a newspaper has missed several issues, or that successive numbers of Frank Meriwether stories do not constitute a periodical, or that the advertising swamps the rest of the magazine so as to become its primary purpose. For such matters, judicial review is inappropriate; an expert in the subject can decide much better. Hence the statute naturally makes the Postmaster General's decision as to classification final, just as a building commissioner has the final say about the proper strength of a public staircase.

Only his power to make final decisions about the fourth and last requirement concerns us. Although this fourth condition relates to content and refers in a general way to ideas, no Postmaster General, so far as I know, for forty-five years after the statute was passed ever thought of using it to curb obscenity or any other supposedly objectionable ideas. The provision was apparently accepted as a broad description of informative publications in distinction from catalogues and other instruments of salesmanship.

How did this statutory power over such neutral matters as dates, bindings, and subscription lists become transformed into a control of objectionable ideas?

<sup>28</sup> 39 United States Code, sec. 226. (My italics.)



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### THE FIRST EXTENSION OF THE POSTMASTER GENERAL'S POWER: THE "MILWAUKEE LEADER" CASE

During the first World War, Victor Berger, a prominent Socialist, was prosecuted under the Espionage Act for his bitter criticism of our war aims and policies in his newspaper, the *Milwaukee Leader*; and Mr. Burleson revoked the second-class permit of the *Leader* after ruling that it had frequently violated this same Act. So far as the actual words of Congress went, the Postmaster General's only power was to exclude any offending copies of the newspaper from the mails altogether. In neither the Espionage Act nor the Classification Act of 1879 did Congress state that bad past issues were punishable by the loss of low postal rates for future issues, however innocent, so long as the Postmaster General might see fit to be unrelenting. Yet the Supreme Court, after upsetting Victor Berger's conviction because his trial was unfair, proceeded to sustain Mr. Burleson's novel construction of the Classification Act.<sup>29</sup>

The effect of this decision was to read past nonmailability into the Classification Act as a new reason for denying or revoking second-class rates. The Court did not rely on the requirement about "literature, the sciences, arts" or say that sedition was not literature. Justice Clarke went on the general ground of policy, that the low rates are granted on the assumption that the periodical will continue to conform to law including both the Act itself and prohibitions against non-mailable matter. A newspaper which has published such matter in several issues may reasonably be expected to continue violating the law. So the government, instead of watch-

<sup>29</sup> *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 United States Reports 407 (1921). See FSUS, pp. 298-305. On the criminal prosecution and Berger's exclusion from Congress see *ibid.*, pp. 247-68.

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ing over every<sup>29</sup> issue in advance, may lessen the future harm by a single act. "Government is a practical institution, adapted to the practical conduct of public affairs."

Holmes and Brandeis dissented. They maintained that, even if the powers claimed by the Postmaster General were desirable, Congress had not seen fit to grant them.

Although the *Milwaukee Leader* case actually involved only the Espionage Act, I assume that it also merges the other nonmailable statutes with the Classification Act. Hence the law would now permit the revocation of second-class rates for a magazine which has persistently published obscene matter in past issues. At any rate, that is the position of the Post Office lawyers.<sup>30</sup>

### THE ATTEMPTED SECOND EXTENSION OF THE POSTMASTER GENERAL'S POWER: THE "ESQUIRE" CASE

*Esquire*, as its editor admitted at the hearings, stresses "the stag-party type of treatment," "the smoking-room type of humor." It runs "cartoons that do feature sex," and its featured pictures are "frankly published for the entertainment they afford." A considerable portion of persons interviewed in a poll it conducted characterized its pictures as indecent or would object to having them in their homes. In September, 1943, the magazine was directed to show cause why its second-class mailing privileges should not be suspended or revoked.

In reviewing the evidence collected at the subsequent hearings, Mr. Walker considered that two questions were presented: (1) Was the publication nonmailable within the obscenity statute and so not entitled to second-class privileges?

<sup>30</sup> *Administrative Procedure in Government Agencies: Monograph of the Attorney General's Committee on Administrative Procedure, Part 12: Post Office Department* (76th Cong., 3d sess.; Senate Doc. No. 186 [1940]), p. 2. This important document is hereafter cited as "Acheson Post Office Monograph."

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(2) Did it fail to comply with the fourth condition of the Classification Act in that "it is not published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry"? After skirting the question of obscenity, he decided against the magazine on the second issue alone and revoked its low postal rates. This order rejected the recommendations of the majority of the board of three officials which had conducted the hearings.

If the Postmaster General had found past issues of *Esquire* repeatedly obscene, he would have been within the *Milwaukee Leader* doctrine. He would have condemned the periodical for a cause which Congress has expressly declared to be criminal and to be a proper basis for some sort of administrative penalties. In other words, he would have applied a "minimal limitation" on the press which was specifically recognized by Congress.

Instead, he went far beyond the *Milwaukee Leader* decision by creating a new minimal limitation, with only such congressional sanction as could be spelled out of the vague phrases of the fourth condition. It was absurd, as he recognized, to give the statutory words "literature," "the sciences," "arts," their usual meanings of distinguished writing, the painstaking search for principles amid multitudinous facts, and the fine arts. That would require a large number of innocent, delightful, and entertaining magazines to pay prohibitive postal rates. Then what did these words mean? The best plan, he thought, was to construe them in the light of a passing observation of Justice Clarke in the *Leader* case, declaring second-class rates to be "a frank extension of special favors to publishers because of *the special contribution to the public welfare* which Congress believes is derived from the newspaper and

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other periodicals press.”<sup>21</sup> This truism about the value of periodicals in general was transformed by Mr. Walker into a drastic requirement that any particular periodical which sought to receive second-class rates must demonstrate that it deserves them. Since these rates are below cost, his argument ran, they are in effect an indirect governmental subsidy to this periodical at the expense of every single person mailing a letter or paying federal taxes. Therefore, he concluded in a key passage:

“A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. *It is under a positive duty to contribute to the public good and the public welfare.*”

*Esquire*, he was sure, did not satisfy this test of contribution to the public good. When the “dominant and systematic feature” of a magazine consists of writings and pictures “in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper,” then the periodical is not making the “special contribution to the public welfare” which Congress intended. The occurrence of such writings and pictures “in isolated instances” would not be fatal. (Was he thinking of the *New Yorker*?) But in view of what *Esquire* habitually contains, Mr. Walker “cannot assume that Congress ever intended to endow this publication with an indirect subsidy and permit it to receive at the hands of the government a preference in postal charges of approximately \$500,000 per annum.”<sup>22</sup>

<sup>21</sup> 255 United States Reports at 410. (My italics.)

<sup>22</sup> The Postmaster General's order is summarized in the *New York Times*, December 31, 1943, p. 1.

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This is by no means a bigoted decision. One can disagree with Mr. Walker's conclusions, as I do, and yet be attracted by the tone of his reasoning, especially its exploratory spirit. Here is a busy Cabinet member confronted with a difficult task of censorship entirely alien to his important regular duties. He is unfamiliar with the relevant considerations to which Mr. Cairns, for example, has given long thought. He gets very little help from the precise words used by Congress in the statute or from conflicting court decisions, administrative interpretations, and official practices. Honestly bewildered, he seizes on an apparently simple solution: The Post Office is giving away subsidies, and he wants to be sure that each donee is meritorious. *Esquire*, he thinks, not only fails to contribute to the general welfare but even acts contrary to it. Aside from its own undesirable qualities, it has inspired a host of imitators which copy only its smoking-room type of humor in grosser forms. This is all part of the increasing appearance of degrading thoughts and conduct on the printed page—a novel phenomenon in American life which is disturbing even to those of us who doubt the wisdom of attacking the evil by law. One gets the impression of a man who is genuinely anxious to better the morals of the country and feels that he has an obligation to do something about it when the opportunity is right before him. At the same time, he admits that he may be mistaken in applying ethics to second-class rates and allows *Esquire* time to get this important matter settled by the courts without losing its subsidy meanwhile.

The Supreme Court did settle the matter, at least for the present, by unanimously preserving low postal rates for *Esquire*.<sup>23</sup> A wide judicial review was possible in this case,

<sup>23</sup> *Hannegan v. Esquire*, 327 United States Reports 146 (1946), affirming *Esquire v. Walker*, 151 Federal Reporter, 2d Series, 49 (Dist. of Col. App., 1945), opinion by Judge Thurman Arnold. The District Court had upheld Mr. Walker (55 Federal Supplement 1015 [D.C. 1944]).

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because a question of law was raised whether the fourth condition of the Classification Act had been correctly construed by the Postmaster General.<sup>34</sup> All the Justices agreed that his interpretation was wrong and that he had acted outside the powers granted him by Congress. The principle now established is: So long as a periodical has not become nonmailable by violating the obscenity statute or one of the other exclusion statutes already discussed, the fourth condition does not authorize the Postmaster General to deny second-class rates on grounds of taste or morals. Justice Douglas said in delivering the opinion of the Court:

. . . . The power to determine whether a periodical (which is mailable) contains information of a public character, literature or art does not include the further power to determine whether the contents meet some standard of the public good or welfare.

The Court's opinion leaves open the question whether the statute would have been constitutional if it had stated in plain words what Mr. Walker read into it, that low postal rates are dependent on "contribution to the public good." The Court decided, not what Congress *could* do, but what Congress *did*. So long as Mr. Walker's ruling was bad under the Classification Act, it was unnecessary to ask whether it was forbidden by the First Amendment.<sup>35</sup>

Still, the First Amendment did play a part in the *Esquire* case by shaping the Court's views of what the fourth condition in the statute really required. If a federal restriction on

<sup>34</sup> On judicial review see below, pp. 315-18.

<sup>35</sup> See the discussion of statutory interpretation above, pp. 282-84. Justice Douglas did suggest that some discriminatory subsidies might be unconstitutional, e.g., if they were conditioned on not expressing certain political or economic views. Justice Frankfurter preferred not to cross this bridge until he came to it; consequently, he wrote a separate opinion agreeing with the result of the case on the sole ground that the statute did not bar *Esquire* from low rates.

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discussion is to be justified at all, it must be for the purpose of avoiding what Holmes called "the substantive evils that *Congress* has a right to prevent."<sup>36</sup> Hence the Court wants to be sure that Congress did really undertake to prevent the particular evil which an official sets out to repress. Congress and not he is charged with determining what kinds of publications endanger the national welfare. This insistence on an express command from Congress is especially urgent whenever the case involves censorship, because of all restrictions on the press this is the most abhorrent. Chief Justice Hughes declared:

. . . . It is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. . . . [It is true that] the protection even as to previous restraint is not absolutely unlimited. . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. . . . The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.<sup>37</sup>

Therefore, the issue in the *Esquire* case was: How much of an inroad on this great tradition against censorship had *Congress* made? Undoubtedly Congress had established a postal censorship over obscenity in order to preserve what Hughes called "the primary requirements of decency." But since *Esquire* was admittedly not obscene, it could be reached only by a big expansion of the postal censorship. Then when did Congress authorize this expansion? In the Act of 1879, if ever,

<sup>36</sup> See above, p. 51. (My italics.)

<sup>37</sup> *Near v. Minnesota*, 283 United States Reports at 713, 716 (1931).

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for there was no other statute to which Mr. Walker could refer. Yet nobody had heard of such a power until September, 1943! Freedom of the press would indeed be in peril if an official were allowed to turn a half-dozen abstract nouns used by Congress sixty-odd years ago into an entirely new reason for putting a periodical out of business. Justice Douglas was not going to let censorship spread by leaps and bounds so easily as that.

The provisions of the Fourth condition would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.

Having found out what the fourth condition does *not* mean, let us see what it *does* mean and clear up the perplexities which made Mr. Walker wander into a dead-end street. As he said, Congress must have intended to exclude some magazines because of their contents, but just which is not altogether clear. Read literally, the statute appears to intrust the determination of literary and artistic value to the Postmaster General. But to me the phrases of the fourth condition seem put in as a rough and common-sense way of describing informative and imaginative periodicals as distinguished from the sales talk in monthly catalogues, etc. Try to define this idea more precisely, and you will see how hard it is to do so. The concluding proviso excluding advertising purposes seems to me to reinforce this interpretation. In short, Congress was not using words with the meticulous care of a criminal statute. The clause embraces, I surmise, any periodical which is intended to be read for information or enjoyment (regardless of the height of the reader's brow) and to exclude a magazine intended by its main makeup to sell things. The Court's explanation is:



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If . . . . read in the context of the postal laws of which it is an integral part, it . . . . must be taken to supply standards which relate to the format of the publication and to the nature of its contents, but not to their quality, worth, or value. In that view, "literature" or the "arts" mean no more than productions which convey ideas by words, pictures, or drawings. . . . The policy of Congress has been clear . . . it was thought that those publications *as a class* contributed to the public good.<sup>38</sup>

The *Esquire* case leaves the law just where it was after the *Milwaukee Leader* case. There is no good reason to think that the drastic doctrine of the older decision is not accepted by the present Supreme Court.<sup>39</sup> Of all the free-speech cases where Holmes and Brandeis dissented, this is about the only one which has not been overruled or judicially discredited.

Congress would do well to consider abolishing the *Milwaukee Leader* doctrine for obscenity. During forty years before that decision, the Post Office could apparently cope with indecency in a periodical by the simple process of declaring the offending issue nonmailable. Is there any evidence that indecency has become so much worse since 1921 that this exclusion power no longer suffices? When the Espionage Act is violated, the ability to suppress the periodical by charging prohibitive rates is perhaps essential to national safety, but obscenity is a pretty small matter to raise such a hullabaloo about. Does a magazine which has strayed across the line of sexual morality really deserve a fine of hundreds of thousands of dollars or total extinction?

<sup>38</sup> 327 United States Reports at 153-54. (My italics.)

<sup>39</sup> Justice Douglas did cite the dissents of Holmes and Brandeis, but he was careful to confine the protection of the *Esquire* decision to "mailable" periodicals. Justice Frankfurter indorsed the *Leader* case by saying that nonmailable matters are of course not "literature" within the second-class privilege. Presumably the *Kreutzer Sonata* of Tolstoy did not cease to be literature for other purposes when it became nonmailable in 1890.

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### DESIRABILITY OF A NEW LAW ADOPTING THE "PUBLIC GOOD" TEST

We may not have heard the last of the test of "contribution to the public good." The Postmaster General's order suggested that if the courts decided, as they have, that the present statute gave him no power to refuse low postal rates to publications like *Esquire*, then Congress ought to amend the statute so as to state more clearly the standards a periodical must meet in order to have a large part of its distribution costs paid out of government funds. It is by no means unlikely that this suggestion will lead congressmen who approved of the banning of *Esquire* to sponsor an amendment of the Classification Act. If so, the bill will probably make the fourth condition say expressly just what Mr. Walker thought it said—that the Postmaster General, in granting second-class rates, must satisfy himself that the periodical contributes to the public good. Congress will be urged to stop subsidizing trash and to help raise the morals of the country.

With this possibility in mind, I shall discuss the desirability of such a law. The arguments for it look good on their face; the objections are easily overlooked and hard to understand. Many thoughtful persons who are not intolerant by nature are troubled by the frequent low tone of magazine pages; they do not see why the Post Office should go on carrying this stuff at a big loss. It is important for citizens to realize the consequences of setting up this new ground of censorship. I am going to leave out questions of constitutionality. Let us consider the wisdom of a statute empowering the Postmaster General to give low rates to a periodical or charge it several times as much, according to his estimate of its value to the public.

The problem is whether "contribution to the public good" is a desirable test for an official to apply in imposing a re-

straint on the communication of information and ideas. It is plain by now, I hope, that this is not just a question of how the government shall hand out gifts, as Mr. Walker thought. The restraint element is clearly present. A subsidy is in a sense a favor, but if it be denied to one periodical and granted to most of its chief competitors, then the omitted periodical is much worse off than if nobody got any subsidy. Take an analogy. A testator is not obligated to leave property to his children at all in many states; but if he divides his estate among all his children except one, this is morally a penalty on the omitted child. You cannot argue to the child who is cut out of the will that he has merely failed to receive a favor. Of course, the condemned periodical is not shut out of the mails altogether, but objectionable ideas can be penalized by discrimination as well as by exclusion. Suppose that Mayor Hague had opened the Jersey City parks to CIO speakers for fifty dollars apiece while those from the AF of L and the American Legion paid only fifty cents. As a practical matter, the loss of second-class privileges results in a denial of the use of the mails, since the remaining available rates are prohibitively high. Even when the refusal of low rates does not violate the First Amendment, it interferes with freedom of the press as a fact. However, some minimal limitations on this freedom are proper, as we have repeatedly seen. So our problem becomes one of deciding whether a novel censorship based on a moral standard much stricter than "the primary requirements of decency" is also a proper limitation. The reasons for any impairment of freedom of the press ought to be very strong, and, in addition, the "public good" test has to overcome three special objections:

1. *Its vagueness renders abuse easy.*—If want of "contribution to the public good" could be objectively established so that any rational person could see that the public got no bene-

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fit from the magazine, then there would be no serious harm in discriminating against it. But you never can be sure that a periodical makes no public contribution the way you can be sure that it is issued only three times a year or has no date or is bound in cloth covers. All you can be sure of is that some person or persons (Postmaster General or board or court or jury) thinks that the periodical does not serve the public good. The only yardstick is in somebody's mind. No doubt the law often has to make use of some mental standard like want of reasonable care or malice. Obscenity itself is a pretty elastic mental yardstick. But these are long established and familiar—we know in a rough way how far they can be stretched. We should be cautious about approving an entirely new mental yardstick, and ask whether it is capable of indefinite elongation and compression in all sorts of unexpected ways, like the characters in the early chapters of *Alice in Wonderland*.

The *Milwaukee Leader* case allowed the Postmaster General to subtract periodicals from the general class of those subsidized if they were guilty of crimes of nonmailability. Obscenity and violations of the Espionage Act are not, of course, clean-cut conceptions, but they are crimes and as such have been subjected to a long series of judicial interpretations, which can serve as guidebooks in rough country. The novel point in the *Esquire* case is the failure to find any crime at all or even any wrong which has occupied the concentrated attention of Congress and been crystallized in a specific statute. It was bad enough with the Espionage Act under Mr. Burleson. Books and periodicals were banned by a single official on charges of a crime which a jury or a court would have been very unlikely to sustain. If the official can run wild in finding a crime, when he has many judicial precedents, he can go much

farther afield when he defines "contribution to the public welfare," which no court has ever construed. There are no guide-books. The personal judgment of the official who decides will have enormous scope. The Nazis had a law against anything contrary to the public interest, and a law of the Restoration Bourbons in France allowed the government to suppress any journal "if the spirit resulting from a succession of articles would be of a nature to cause injury to the public peace and the stability of constitutional institutions." Such laws have been held up to scorn by English and American writers in contrast with our liberty of the press. Yet "lack of contribution to the public good" is equally vague.

In fact, the phrase is almost the same as "what I think seriously objectionable." Since the power will extend beyond sex cases, it may be used to wreck journals of political or economic views which a substantial number of people think would be ruinous to the nation if adopted. The test of general welfare might allow a Republican administration to rule out Democratic newspapers or vice versa, just as the Federalist administration used the Sedition Act of 1798 to silence Jeffersonian editors. Think of what a reactionary Postmaster General could do to the liberal press or the labor press under such a law. One member of our Commission observed: "It is a sound practice in a democracy not to establish an engine of government which we are unwilling to put into the hands of our enemies."

Justice Douglas in the *Esquire* opinion touched on this danger of arbitrary censorship if every applicant for second-class rates were compelled to convince the Postmaster General that *his* periodical contributes to the public good:

Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature,

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what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values. But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official.<sup>40</sup>

It is true that Justice Douglas was showing why the Postmaster General ought not to put the "public good" test into the Classification Act by interpretation; but his reasons are equally strong against Congress putting it in by an amendment. The test will do harm in the Act, no matter how it gets there.

2. *The "public good" test is hard to administer honestly.*— Besides giving an unscrupulous official opportunities for intolerance, as just indicated, the test will subject a conscientious official to constant perplexities. The phrase "contribution to the public good" looks simple, but it is really a shorthand description of a group of problems. In dealing with writing and pictures, we cannot limit "good" to morality in the narrow sense. Boccaccio is a good storyteller. The public welfare is promoted by literary and artistic distinction as well as by edifying principles. Consequently, the official who is really trying to make the "public good" test work will have to appraise the merits of magazine fiction and illustrations and balance those merits against moral objections in order to

<sup>40</sup> 327 United States Reports at 157-58.

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evaluate the total effect of the periodical. This is a delicate and difficult task, something like what Mr. Cairns has to do under the proviso in the customs statute,<sup>41</sup> but much more troublesome. (a) The volume of domestic magazines far exceeds that of imported books. (b) Since what appears in periodicals is hot off the griddle, there is little chance of its being recognized as meritorious by a reputable body of American critical opinion to which a postal official can turn for guidance as Mr. Cairns does. (c) The area of questionable matter is much greater. In the Customs a book must first be ruled "obscene" before any of this balancing is necessary, but the "public good" test requires it whenever a periodical has any qualities which the postal official thinks morally harmful, though falling far short of criminal indecency. Damon Runyon, let us say, has been publishing a series of short stories in a magazine. All the characters are gangsters, burglars, confidence men, and their victims, and everybody stays out of jail. How many minus marks shall be chalked down for this encouragement of crime? How many pluses shall be awarded for Mr. Runyon's sharp delineation of human traits, the humorous dialogue, the entertaining incidents? Imagine the Postmaster General adding up the plus and minus columns to see whether these stories pass the "public good" test. Yet no conscientious official can avoid such a job of mixing literary and artistic standards with moral standards should this proposed test become law.

A somewhat parallel situation is found in the law of copyright, which, like the Classification Act, relates to legal benefits for literature and art. When two lower United States courts had held that a circus poster did not deserve copyright protection because of its low artistic qualities, Justice Holmes

<sup>41</sup> Above, pp. 251, 261-65.

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reversed them and wrote a very instructive opinion showing the unfitness of law to pass on such issues:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to *pictures which appealed to a public less educated than the judge*. Yet if they command the taste of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and *the taste of any public is not to be treated with contempt*. It is an ultimate fact for the moment, *whatever may be our hopes for a change*.<sup>43</sup>

The passages I have italicized are especially relevant to our problem. No doubt, actually obscene pictures cannot be validly copyrighted; they fall within the “most obvious limits” mentioned by Holmes.<sup>44</sup> Even here the determination is judicial. The administrative officials in the Copyright Office accept whatever comes so long as it complies with objective statutory formalities. And neither judges nor officials can deny legal benefit because they have a poor opinion of the value of the book. If “public good” be made the basis of low postal rates, then the Post Office will be engaging in the “dangerous undertaking” against which Justice Holmes warned. Persons “trained only in the law” or in the complex business problems of managing the mails will be constituting themselves “final judges of the worth of pictorial illustrations” and the text in periodicals.

<sup>43</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 United States Reports 259 at 251–52 (1903). (My italics.)

<sup>44</sup> See E. S. Rogers, “Copyright and Morals,” 18 Michigan Law Review 390 (1920), which describes some absurd strait-laced decisions.



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3. *This is not the right way to raise morals.*—Although we all desire to make the country better and, particularly, to improve taste in periodical literature, we should consider whether this is the proper function of government officials, especially in the Post Office. Should the Postmaster General take over the work of churches and schools and critics of life? Is a system of regulating a great business activity like the Post Office a mechanism well adapted to the task of moral elevation? It is just as if the New York subway, which carries passengers much below cost, undertook to promote morals by refusing this subsidy to persons whom its general manager classified as immoral. Imagine the test of "contribution to the public good" used to make bad people walk or pay a double fare. Perhaps the city would be better, but nobody would trust subway officials to sift the good from the bad. Whether it be subways or Post Office, the issue is the same—the wisdom of allowing a businessman to use his power over a great commercial mechanism for the sake of raising morals, by granting or refusing pecuniary benefits according to his own best judgment of the worthiness of the recipients. We shall get along better if administrative officials adopt Holmes's attitude in the case of the circus posters and take the world pretty much as they find it, except for crimes like obscenity. Like the rain, they should fall on both the just and the unjust. Literary and moral problems had better be left to those who are specially trained for them and to methods of encouraging the good and discouraging the bad which are more flexible and persuasive than rules of law can ever be.

It is not merely a question whether a particular government official selected for his capacity to rush mail along is suited to handle delicate problems of taste and morals. A much deeper question is raised: How far is law the right tool

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for that purpose? Can it do satisfactorily anything beyond lopping off the most offensive types of wickedness? What are the limits of compulsion? Can you make people good by law? Can you successfully shape all your law to attain a noble and tightly integrated conception of national life?

Some of the wisest and best of men have thought they could—Plato, Savonarola, Calvin, Cromwell, the theocracy of the Massachusetts Bay Colony. Each had a definite picture of society which he wanted to have realized by compulsion. Yet later idealists have recognized that these men banned the satisfaction of human wants which cannot be safely ignored. Their ideal communities were too largely projections of their own special natures. "Because thou art virtuous, shall there be no more cakes and ale?" Life has more facets than any one man can appreciate no matter how unselfish and thoughtful. Idealists cannot easily allow for the animality in us. So long as war is an overwhelming part of life, may not public good be served when those subjected to the unnatural strains of combat and discipline get occasional relief by a few hearty belly-laughs from periodicals like *Esquire*?

So I conclude that it is undesirable to try to separate the wheat from the tares by the "public good" test. On the one hand, it will just scratch the surface of immorality, and, on the other, it opens up almost unlimited possibilities of censorship. One of the main reasons for the separation of church and state is the natural inclination of men with high moral purposes to use compulsory powers so as to mold the intimate details of everybody's life according to their own ideals.

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In order to understand the actual extent of the powers of the Post Office over the communication of news and ideas, the

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readers of this book ought to know how and by whom the questions are decided whether a publication is nonmailable and whether the past issues of a periodical were nonmailable so as to forfeit low postal rates for the future. Yet the ensuing account of the way the line is drawn has to be unsatisfactory, because whatever can now be learned on this subject may be out of date by the time the book is published. The Administrative Procedure Act,<sup>44</sup> which the President signed on June 11, 1946, has been in operation for only a few months. This far-reaching statute is "an outline of minimum essential rights and procedures"<sup>45</sup> for many federal departments, commissions, and other agencies. Although the new law does not, I think, concern what has been said about the control of imported books in the Customs,<sup>46</sup> it will surely alter Post Office censorship. For instance, the rules governing the conduct of hearings on the denial of second-class rates will probably have to be revised. Exclusion from the mails is less affected, since there are no customary hearings to be regulated anew,<sup>47</sup> but the somewhat widened scope of judicial review in the Act may perhaps stimulate improvements of the entire administrative mechanism for determining questions of mailability. The best

<sup>44</sup> 5 United States Code, secs. 1001-11.

<sup>45</sup> House Judiciary Committee, *Administrative Procedure Act* (79th Cong., 2d sess.; House Report No. 1980 [1946]), p. 16. This report gives very useful information about the history of this important statute.

<sup>46</sup> The Customs seems to be excepted from the Act because the actual power of decision is vested either in a court or in the uncontrolled discretion of the Secretary of the Treasury (under the proviso). See the opening clauses of 5 United States Codes, secs. 1004 and 1009.

<sup>47</sup> The requirements of the Act as to hearings and administrative decisions (secs. 1004-7) apply only to adjudications where opportunity for a hearing is ordered by some statute, e.g., by the Classification Act if second-class rates are to be revoked. But most of the requirements for judicial review (sec. 1009) are not thus limited; see, however, sec. 1009(e)(B)(5), discussed below, pp. 317-18, 364.

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that can be done in the face of such uncertainties is to describe postal procedure as it has been during the deliberations of our Commission and merely indicate various points where the Administrative Procedure Act seems likely to produce significant changes.

### THE PREDOMINANCE OF ADMINISTRATIVE MECHANISM

In the postal control of obscenity and other wrongs, officials almost always make the vital decisions. Courtroom mechanism, which is constitutionally guaranteed in the criminal law and available to correct mistakes by the Customs, plays very little part in determining that publications are nonmailable except in the rare instances when the Post Office sees fit to go after the sender.<sup>48</sup> He of course gets trial by jury with a judge and the usual appellate review before he can be sent to jail or fined. But when the Post Office follows its ordinary course of striking at the book or the periodical, there is no jury and no trial judge and no true appeal. On issues of fact and the application of statutory standards like "obscene" to the facts,<sup>49</sup> the determination of the Postmaster General (or his subordinates) has long been treated as final.<sup>50</sup> This means, roughly, that so long as the official acts fairly and interprets the postal statutes properly, nobody can correct his mistaken decision that the publication has violated one of those statutes and must consequently be deprived of the cheapest and most convenient mode of distribution.

<sup>48</sup> Examples are *United States v. Kennerley*, 209 Federal Reporter 119 (N.Y. 1913), opinion by Judge Learned Hand; *United States v. Dennett*, 39 Federal Reporter, 2d Series, 564 (C.C.A. 2d, 1930), opinion by Judge A. N. Hand; *United States v. Levine*, 83 Federal Reporter, 2d Series, 156 (C.C.A. 2d, 1936).

<sup>49</sup> On questions of legal standards see FSUS, pp. 501-3.

<sup>50</sup> The authorities on the narrow scope of judicial review of postal censorship are summarized by Judge Hough in *Masses Publishing Co. v. Patten*, 246 Federal Reporter 24 at 31-33 (C.C.A. 2d, 1917).

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Consequently, any publisher who wanted to upset the action of the Postmaster General has had a hard row to hoe. He has been obliged to convince the court that the case falls within one of three narrow categories.

1. The administrative proceedings violated elementary requirements of fairness—what the Fifth Amendment calls “due process of law.” Although periodicals are given ample opportunity to show why they should not lose their low postal rates, a much smaller amount of fairness seems to be thought sufficient when a publication is excluded from the mails altogether. The publisher is usually given no warning to appear to defend his product. Absence of notice and of a hearing vitiates most other administrative proceedings, but only one case has been found which regarded this as a reason for reversing a postal exclusion order.<sup>51</sup> Perhaps the demand for speed is considered paramount, just as a policeman does not have to hold a hearing before tearing down a grossly indecent poster on a billboard.

2. There was *no evidence* to support the official finding, or perhaps only a very little evidence. This ground is not of much help in most obscenity cases. There is no room for dispute about the bare facts, which are in the book itself. The controversy turns on the inferences to be drawn from those facts, and many persons who disagree with the official inference of criminal indecency will usually concede that the book is not white as the driven snow.

3. The official has made an error of *law*, for example, by violating the Constitution, or by interpreting his statutory powers too widely as Mr. Walker did in the *Esquire* case. However, when the Postmaster General construes words like

<sup>51</sup> *Walker v. Popenoe*, 149 Federal Reporter, 2d Series, 511 at 513 (Dist. of Col. App., 1945), with interesting opinions by Judges Edgerton and Arnold.

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"obscene" or "indecent" in a statute, these terms are so vague that a court will rarely say they have been stretched too far, although a pamphlet on sex instruction was restored to the mails for this reason.<sup>52</sup>

The usual procedure by which the publisher seeks judicial review of a postal ruling is by starting an independent federal suit to enjoin the official from acting under his ruling. This suit used to be brought against the local postmaster in the United States District Court where the item was mailed, e.g., in New York City; but present practice obliges the suit to be started in the District of Columbia against the Postmaster General. This relief is expensive and inconvenient, besides rarely accomplishing anything. An unbiased report states: "Since the Postmaster General is an executive officer vested with broad discretion in the premises, hampered by only the most general definitions of . . . 'disloyal matter,' and 'obscenity,' the courts have been singularly loath to interfere. Few of the hundreds of injunction suits . . . have been successful."<sup>53</sup> Contrast the procedure in the Customs, where a court retries everything afresh—both law and facts.

The Administrative Procedure Act will somewhat widen the scope of court review. Besides codifying clearly and fully the grounds which were already recognized, it also raises the amount of evidence necessary to an official's decision on the facts impregnable to judicial attack. A court will henceforth be able to set aside the denial of second-class rates if it is "unsupported by substantial evidence," whereas a very little evidence has hitherto been enough to make a court keep its

<sup>52</sup> *Ibid.*; a similar criminal case is *United States v. Dennett*, above, n. 48. See also Judge Learned Hand's opinion in the *Masses* case under the Espionage Act, FSUS, pp. 42-51; but this was reversed, above, n. 50.

<sup>53</sup> Acheson Post Office Monograph, p. 2.

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hands off.<sup>54</sup> It remains to be seen how much practical difference results from this change in the quantity of proof. Furthermore, it applies only to decisions based on a "hearing provided by statute"; consequently, the old rule still holds in exclusion cases because the nonmailable statutes say nothing about a hearing. Whatever the Act does, I feel sure that it leaves much less room for court trials than there is in the Customs under the Tariff Act of 1930.

All this discussion of judicial review brings me back to the position which I have previously taken—that obstacles to the easy use of courtroom mechanism, whether legal or practical, throw upon officials a strong moral obligation to be sure that their administrative mechanism is deciding cases fairly and efficiently. The less chance there is to correct mistakes, the greater the duty not to make mistakes. Let us, therefore, forget the courts for the time being and look at what happens inside the Post Office Department.

### ADMINISTRATIVE DETERMINATION OF VIOLATIONS OF THE ESPIONAGE ACT

Postal censorship of disloyal publications raises special problems. This leads me to dispose of the entire topic at once and then go on to obscenity. During the present war only one case is known to me, but this involved a magazine of large circulation, Father Coughlin's *Social Justice*, which was totally shut out of the mails and not merely deprived of low rates as were the *Milwaukee Leader* and several other periodicals during the first World War. It will simplify matters if I assume that a magazine is in question rather than a book and devote most of my attention to procedure in exclusion cases.

Theoretically, the procedure by which one issue of a period-

<sup>54</sup> 5 United States Code, sec. 1009(e)(B)(5). Cf. my paragraph 2 (above, p. 316) and nn. 50-52.

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ical is banned from the mails under the Espionage Act is initiated by the examination of the current issue of the periodical in question by the postmaster at the point of mailing. If he believes that it contains matter which is nonmailable under the Act, the issue is withheld from the mails, and copies are transmitted to the Solicitor of the Post Office Department (its legal adviser). The issue is examined by the Solicitor's office; and the postmaster is thereupon instructed by the Postmaster General either to allow the publication to pass through the mails or to reject it. This procedure is designed to prevent postmasters from acting upon their individual judgments in withholding a publication from the mails.

The *Social Justice* case was run somewhat differently. The initiative was taken in Washington and came from outside the Post Office Department. Each issue of the magazine, beginning with that of April 6, 1942, was rejected by the local postmaster after receipt of instructions from the Postmaster General, who acted in the first instance on complaint of the Attorney General. There appears to have been active co-operation, in connection with the Espionage Act, between the Post Office Department and the Department of Justice. In practice, the opinion of the Attorney General was ordinarily obtained before a publication was withheld as nonmailable under this statute.

In a way, this was an odd situation. Since there was no hearing before anybody and no published opinion, the publisher did not know who was deciding his case. The statute directed the determination of disloyalty to be decided by the Postmaster General (or his subordinates), but perhaps it was really adjudicated by some unknown lower official in the Department of Justice. Who can tell? Still the Attorney General must have approved this man's action, and the Postmaster



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General had to consent because he signed the order. The national safety may be involved in the distribution of a magazine which is bitterly adverse to governmental policies, so it is not surprising that the Cabinet member who is in charge of federal prosecutors and policemen should want to take a hand.

The suppression of *Social Justice* did not stop with its exclusion from the mails. The Trading with the Enemy Act of 1917 made it unlawful for any person "to transport, carry, or otherwise publish or distribute any matter which is made non-mailable" by the Espionage Act.<sup>55</sup> Relying on this statute, the Attorney General stopped sales of *Social Justice* on the streets, presumably of the banned issues only, and apparently prevented its transportation by express or similar channels. This action, combined with the exclusion from the mails, would seem to have effected a complete censorship of the issues which violated the Espionage Act, or more correctly which were thought by some law-enforcing officials to violate it when they did not have to listen to any arguments on the other side.

Not long afterward I heard a roomful of Wall Street lawyers voice their indignation against the extinction of a prosperous magazine by executive fiat. Every one of them violently disagreed with Father Coughlin's opinions, and so do I, but they had been brought up on Magna Carta and due process of law and the notion that a business has a right to notice and an impartial hearing before it is condemned.

Since the power to deny second-class rates (established by

<sup>55</sup> 40 Statutes at Large 411 (1917), sec. 19. Probably the search-warrant provisions of the Espionage Act could have been invoked if special authority was desired for seizing all possible copies of the offending publication (18 United States Code, secs. 611-33; FSUS, pp. 485 ff.). But it takes time and trouble to obtain search warrants.

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the *Milwaukee Leader* case) was not invoked in the present war and since the procedure will be fully discussed in connection with obscenity, I shall simply explain the practical reasons why government officials desire to retain this sanction against any periodical which has pursued through a number of issues a policy considered seditious. They are not satisfied to rely just on the express nonmailable provision of the Espionage Act. The administration of that provision over a period of time can at best be only cumbersome and inefficient. It is a nuisance to take separate action against every single issue, whereas withdrawal of second-class privileges seems to present an effective barrier, once for all, against the continued circulation of the newspaper or magazine by mail. Furthermore, revocation proceedings are in some ways better for the publisher. No hearing is provided by the Espionage Act for an exclusion case. It is true that a hearing might be voluntarily accorded upon each issue, but the procedure of such a hearing is not clear—there are no departmental regulations, no established practice. And the time factor would in many cases be obstructive, e.g., in cases of weekly publications. By making the issue one of revocation or suspension of second-class rates, the government entitles the periodical to a hearing under well-settled rules. This appears to be fairer to the publisher and to have the advantage of bringing all the facts of a case to light and into public view. Certainly *Social Justice* got less justice than did the *Milwaukee Leader*.

The law should, I think, handle the whole problem of procedure under the postal clause of the Espionage Act as a war problem quite distinct from postal control of indecency and other peacetime wrongs. The use of the mails during war by a periodical like *Social Justice* is only one among many manifestations of dissensions between groups of citizens and of bitter

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opposition to our war aims. The practical question before the government in such a case is not what to do with the periodical, as when the Post Office proceeds against an oversexed magazine, but how best to deal with the serious internal situation. That question has to be answered by the President and his chief advisers as part of their difficult task of managing the war crisis. The fate of a particular magazine under the Act as it now stands is likely to depend on the way the general war policy of the Administration chooses between toleration and vigorous suppression. The magazine will receive careful consideration, by the Department of Justice rather than by the Post Office; but an impartial adjudication is hardly to be expected under such conditions, especially in exclusion cases where there is no hearing.

If Congress should reconsider the Espionage Act before any war emergency arises, it might ask whether it would be possible, without sacrificing national safety, to devise a better way of sifting really dangerous publications out of a mass of hostile criticisms of the conduct and aims of a war, remembering that this kind of censorship is liable to impair political and economic discussion which the framers of the First Amendment especially wanted to protect. Whatever new safeguards Congress should choose to set up against official bias and individual idiosyncrasies in determining disloyalty during a war might differ considerably from the safeguards which are advisable for a case of obscenity. For example, the scope of court review might be made wider so as to avoid the unusual pressures upon official rulings which war creates. On the other hand, some desirable peacetime procedure may be too slow for such emergencies. It may be better to decide fast than to spend a great deal of time in being sure you are right—the ordinary attitude of the law.

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During such a revision of the Espionage Act, Congress might also consider whether prosecution of a war requires that seditious publications be denied low postal rates for the future, as the *Milwaukee Leader* case decided. Congress might conceivably think that the Postmaster General does not need this power in obscenity cases, and yet that it is necessary to national safety for him to possess it in Espionage Act cases. In that event it would be desirable to clarify the *Milwaukee Leader* doctrine by putting it right into the Act. Furthermore, instead of having two quite different proceedings against a periodical as now—one to shut out present issues and the other to take away low rates in future—the Act might combine both powers in a single proceeding. A possible scheme for such an amendment would be this: Individual issues of a publication may be impounded pending a hearing of a character which can be carried out expeditiously. After hearing, these individual issues may be excluded from the mails as nonmailable matter if they are found to violate any of the prohibitions of the Espionage Act. The use of the mails, or second-class mailing privileges, or both, may be denied to a publication if, after hearing, it is found not only that an individual issue has contained seditious material but also that there has been a continuing course of conduct reflected in a number of issues which indicates that the continued publication of the magazine or periodical will interfere with the prosecution of the war in ways described in the Espionage Act, or that the general purpose and intent of the publication are such as to interfere with the war.

Such an amendment has the advantage of introducing hearings into exclusion cases under the Espionage Act and thus making them as fair as classification cases.

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### ADMINISTRATIVE DETERMINATION OF OBSCENITY

Here I shall reverse the previous order of topics and begin with what we know most about.

*Revocation of second-class rates.*—In the organization of the Post Office, the Postmaster General has the duty to superintend generally the business of the Department and execute all the postal laws,<sup>56</sup> but the direct management of the various activities is divided among several high executives, including four Assistant Postmaster Generals and a Solicitor. The Solicitor, as the chief lawyer for the Department, is charged by the Regulations, among other things, with prosecuting postal cases when desired to do so and “with the consideration of all questions relating to the mailability of alleged indecent, obscene, scurrilous, or defamatory mail matter.”<sup>57</sup> Of course he has under him a staff of lawyers, to whom these duties are often delegated; “Solicitor” will be understood to denote any such person in his office. The duties of the Third Assistant Postmaster General include “the classification of domestic mail matter.” In his office is the Division of Classification, headed by a Superintendent with a staff of over fifty persons, some of whom may incidentally be lawyers. This Division is subdivided into several groups, one of which determines questions related to second-class mail matter.<sup>58</sup> However, when questions of obscenity are involved in second-class cases, they are referred to the Solicitor’s office and settled by him. Although the Postal Laws and Regulations seem to call for exercise of the Third Assistant’s independent judgment, still, whenever the Solicitor declares matter in a periodical to be nonmailable, proceedings for revocation of its second-class

<sup>56</sup> 5 United States Code, sec. 369.

<sup>57</sup> 39 Code of Federal Regulations (1938), sec. 1.4(f).

<sup>58</sup> *Ibid.*, sec. 1.7.

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permit automatically follow his decision as a matter of course.<sup>59</sup>

The initiative for revocation on the ground of obscenity may come from advice received from local postmasters or members of the general public, and the Department in Washington sometimes scrutinizes of its own accord publications suspected of obscenity. When a member of the public thus sets the machinery in motion, his identity is not disclosed. This practice may be subject to some criticism, but it makes law enforcement easier and there is little danger of trumped-up charges when the material speaks for itself, once it is examined.<sup>60</sup>

The Classification Act provides that second-class rates shall not be suspended or annulled until a hearing shall have been granted to the parties interested.<sup>61</sup> In 1940 the Attorney General's Committee on Administrative Procedure in Government Agencies reported that hearings in the usual sense were not held.<sup>62</sup> There might be an informal conference in Washington with no presiding officer and no stenographic record, or perhaps only a considerable correspondence between the Department and the publisher. No statement of reasons accompanied an order of revocation. This criticism led the Department to adopt in April, 1942 (before the *Esquire* case), a carefully drawn set of regulations which now govern revocation proceedings.

These rules provide many of the safeguards of fairness familiar in a courtroom trial.<sup>63</sup> The action is instituted by an

<sup>59</sup> Acheson Post Office Monograph, p. 4 and n. 15.

<sup>60</sup> *Ibid.*, pp. 6-7.

<sup>61</sup> 39 United States Code, sec. 232.

<sup>62</sup> Acheson Post Office Monograph, pp. 9-10.

<sup>63</sup> These rules are printed in 39 Cumulative Supplement to Code of Federal Regulations (1942), sec. 5.37a.

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order to show cause why the second-class permit should not be revoked (or suspended). This is sent by registered mail to the publisher and tells him the time and place of the hearing and the matters to be considered, specifying the issues and passages thought to be nonmailable. He may then file defenses if he desires. If the publisher wishes a hearing, it is normally at the Department Building in Washington and is public unless the Postmaster General orders otherwise. It is held before one or more hearing officers designated by him. "The hearing officer is charged with the duty, and vested with the authority, to conduct a fair, impartial, expeditious, orderly and dignified hearing." The publisher may appear in person or by counsel, and the Solicitor represents the Department. The usual order of a trial is prescribed with introduction of witnesses and documentary evidence by each side, followed by oral arguments of an hour apiece and opportunity for the filing of briefs. A stenographic transcript is to be made. "Upon the basis of the hearing, arguments, and briefs the hearing officer shall promptly prepare a report which shall include his findings, conclusions, and recommendations." This is transmitted to the Postmaster General with the transcripts, briefs, and exhibits; but, unless he so orders, it is not made public or shown to the parties. Upon the basis of this report and the papers in the case, the Postmaster General (or his duly designated representative) decides the case without further argument by the parties. He revokes or suspends the permit or dismisses the proceeding and may add a statement of his reasons, as Mr. Walker did in the *Esquire* case.

These rules are so good that the Administrative Procedure Act of 1946 does not seem to call for much change in what now happens in revocation cases, but two points in the recent statute are worth mentioning. First, it contains some new

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provisions for insuring the independence of the hearing officer.<sup>64</sup> He must not consult the Solicitor about any fact in issue unless the publisher (or his lawyer) is also present, and the Solicitor must not take any part in the preparation of the hearing officer's report. Perhaps this desirable separation of the prosecuting function from the deciding function has already been maintained in obscenity cases, but something quite different was going on in mail-fraud cases in 1940, according to the Attorney General's Committee.<sup>65</sup> After the fraud hearing, the trial attorneys who had been conducting the government's side of the case from the start consulted informally with the hearing officer to "see how the case stacks up" in his mind. Then these prosecutors drafted *his* intermediate report to the Postmaster General, stating conclusions about the facts and how the case ought to be decided, and brought it to the hearing officer for his approval. Meanwhile the defendant's lawyer was far away. If this practice of the Department lawyers in fraud cases has had any contagious influence on their handling of revocation cases, the 1946 Act puts a stop to it. Secondly, the Act (as I read it) makes the hearing officer more like a trial judge, by transforming his report from a mere set of recommendations into the "initial decision" of the case.<sup>66</sup> Unless either side appeals to the Postmaster General, the hearing officer's decision stands and settles the fate of the periodical.

*Exclusion from the mails.*—It is hard to ascertain just what happens when exclusion alone is involved. Although the issue of obscenity is the same as in revocation proceedings, Con-

<sup>64</sup> 5 United States Code, sec. 1004(c).

<sup>65</sup> Acheson Post Office Monograph, pp. 30-35.

<sup>66</sup> 5 United States Code, sec. 1007.



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gress has not required a hearing, and the Post Office has not provided any of the elaborate safeguards of fairness which are established where low postal rates are threatened. The issue is apparently referred to the Solicitor for his determination, and, if it be unfavorable, the case seems to end there unless the Postmaster General cares to review it. Occasionally wealthy or important mailers may confer with the proper officials in Washington or there may be some correspondence, but there seems to be no sort of trial unless exclusion is proposed to be followed by the loss of second-class rates. The Acheson Monograph said in 1940 that sometimes a magazine publisher did not even know that an issue had been banned from the mails until his subscribers began sending in complaints that this number had never reached them. The Attorney General's Committee recommended that the publisher should always be given notice, even though exclusion must usually be prompt,<sup>67</sup> but I am not sure whether the practice was changed accordingly.

In order to tell how much harm is caused by this one-sided adjudicating, some enthusiast for research would have to examine a large sampling of books and magazines ruled obscene and pick out whatever was unjustly condemned. Since all the publications examined would be on the border line of indecency, and most of them beyond it, the task would be about as edifying as an investigation of hundreds of garbage cans for the sake of learning how much edible food is wastefully thrown away by American housewives. Without any real evidence, there is ample room for conjecture. One view is: "The absence of public clamor would seem to indicate that only cheap and tawdry obscenity has been barred, and that there

<sup>67</sup> Acheson Post Office Monograph, p. 13, n. 48.

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has been no confusion between filth on the one hand, and what some might insist is art or education on the other.”<sup>88</sup> Yet enormous variations in three successive years may indicate that what is “obscene” depends largely on the personality of the particular man on the Solicitor’s staff who does his work and on the moods of the moment.<sup>89</sup> Whether much of worth is condemned or not, the government which enforces justice upon its citizens cannot afford to conduct its own affairs without regard to elementary principles of fairness. Furthermore, the exclusion of Tolstoy’s *Kreutzer Sonata* from the mails years ago and the recent threat to *Strange Fruit* show that the postal censorship is not necessarily limited to trash. It is capable of arbitrarily condemning works of literary and artistic distinction, even if it has not yet done so often, and the following account of the fate of Carlo Tresca’s periodical *Il Martello* shows how the postal power to exclude may be abused for political purposes:

“In July 1923, the Italian Ambassador made a speech in New York in which he said ‘A certain paper in the United States is embarrassing to the Fascist government and should be suppressed.’ . . . .

“July 21, issue of the paper held up; no explanation.

“August 10, Tresca arrested for article ‘Down with Monarchy,’ then three months old.

“August 18, Post Office Department ordered the deletion of an announcement of a raffle. Two other newspapers carried the announcement unmolested.

“September 8, issue held up for two-line advertisement of a

<sup>88</sup> *Ibid.*, p. 13.

<sup>89</sup> See *Ibid.*, p. 2, n. 8; p. 13, n. 48; p. 14 and n. 52. The figures given are nearly forty years old, however.

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birth-control book. . . . Other newspapers carrying the same advertisement were not molested.

"October 30, Tresca indicted for above offense.

"October 27, issue held up because of an account how Fascisti had forced an Italian woman to drink a large dose of castor oil. Most American papers carried the same story unmolested."<sup>70</sup>

Although the Administrative Procedure Act of 1946 does not directly substitute a fair hearing for the sort of procedure I have just described, it may eventually bring about improved methods of administrative determination of obscenity through its recognition of judicial review, as I have already suggested, and by the still more powerful incentive of the section which orders every government agency, including the Post Office, to publish systematic information about what it is doing. This information is to include:

statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available. . . .<sup>71</sup>

I think that no Postmaster General will be willing to put down in cold type a description of such procedure as was used in the case of *Il Martello*. He will want to have something more creditable than that to disclose to the public. Moreover, the present baffling secrecy of exclusion decisions seems likely to be ended by this provision:

Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases. . . .<sup>72</sup>

<sup>70</sup> *Ibid.*, p. 13, n. 49. Although the account is taken from a partisan source, it derives authenticity from being quoted without question in this carefully prepared and discriminating public document.

<sup>71</sup> 5 United States Code, sec. 1002(a)(2).

<sup>72</sup> *Ibid.*, sec. 1002(b).

## POSSIBLE PROCEDURAL IMPROVEMENTS

### POSSIBLE PROCEDURAL IMPROVEMENTS OF BOTH POSTAL POWERS OVER FREEDOM OF THE PRESS

It will be convenient to subdivide procedure as follows:

- I. Mechanism of administrative determination
  - A. Notice and hearing
  - B. Segregation of functions
- II. Who decides?
  - A. Administrative personnel
  - B. Judicial review

The discussion will take the form of a series of problems, as when I dealt with "The Correction of Errors."

#### I. MECHANISM OF ADMINISTRATIVE DETERMINATION

Since a good deal has been said already about rules governing cases on second-class rates, I shall speak mostly of exclusion from the mails, as to which there are no rules, perhaps no notice, and usually no hearing by anybody.

##### A. NOTICE AND HEARING

*Problem 1. Should notice be required in exclusion proceedings?*—If this is not already required in response to the Acheson Monograph, it should be. It is elementary fairness. The Supreme Court has repeatedly insisted on it in judicial proceedings and in administrative proceedings before many boards and commissions. Notice enables the publisher to adjust matters with his subscribers and news agents who are otherwise upset by the nonarrival of an issue of a periodical, and with readers and booksellers who fail to receive an ordered book; and it warns him promptly to take up the matter with the postal authorities.

*Problem 2. Should a hearing be required in exclusion proceedings?*—In judicial action and in many types of administrative action, a fair trial is essential. The person whose liberty or property is at stake must be given an adequate opportunity

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to meet the government's evidence and arguments in the open and present his defense on the law and the facts. The 1942 Postal Rules on revocation of second-class rates and the recent Administrative Procedure Act show in detail what the right to a hearing means. Therefore, it is a marked departure from American traditions of justice for the Post Office to determine obscenity for exclusion purposes without any orderly consideration of both sides of the question. Perhaps after seventy years it is too late for the Supreme Court to upset this unusual departmental practice as an unconstitutional denial of "due process of law"<sup>73</sup> or as an erroneous interpretation of the nonmailable statutes.<sup>74</sup> But what is old may not be desirable. Our experience of administrative decisions has grown greatly since obscenity was first shut out of the mails in 1872, and it has taught us a good deal more about the importance of carefully planned procedure for reaching those decisions than was known in the days of President Grant. Hence the postal officials might very well reconsider their practice in exclusion cases and see whether they have any strong justification for continuing to refuse a hearing. Is it sensible for them to pass on obscenity in a second-class rate case after a well-regulated administrative trial, and yet decide exactly the same issue in a nonmailable case by some correspondence or a short conversation across a desk? This marked difference in treatment calls for some convincing explanation if it is to last. Of course, many more dollars are involved in the loss of low postal rates

<sup>73</sup> But see *Walker v. Popenoe*, above, n. 51.

<sup>74</sup> The argument for want of statutory authority is that officials must not take the unusual course of refusing an adequate hearing unless Congress has flatly told them to do so. The fact that the nonmailable statutes say nothing about a hearing one way or the other is not enough by this view; the Post Office should fill the gap by construing the statutes as impliedly calling for normal methods of settling controverted issues. See the reasoning of Justice Douglas in the *Esquire* case, quoted above, p. 303.

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than in the condemnation of one issue of a magazine or one book, but the law is not accustomed to regard justice as a luxury reserved for "the big money." And a hasty decision which mistakenly keeps a single book or article out of the mails impairs the freedom of both author and readers. Consequently, unless the postal officials can point to urgent reasons for the present summary disposal of cases under the old obscenity statute, the time is at hand for them to provide adequate hearings by issuing a new set of rules comparable to those promulgated for revocation in 1942. Indeed, when the publication is a magazine, the same hearing could conveniently deal with both the exclusion of past issues for obscenity and the denial of low rates for future issues.<sup>75</sup> There is no need to wait until Congress expressly orders a hearing. The Department has a good precedent for taking the initiative; it has long held a full hearing in every fraud case, although the statute merely authorized the Postmaster General to issue the order of condemnation "upon evidence satisfactory to him."<sup>76</sup>

There is, however, something to be said on the other side. Two practical objections which have been advanced against a formal hearing are that there is not time for it and that it would do no good. Let us examine these in turn to see how strong they are.

First, it is said that a hearing would interfere with the speed which is requisite in nonmailable cases. The local postmaster has detained the book or the particular issue of a periodical, and it must be decided right away whether this shall go out or not.

There are indeed situations where an administrative of-

<sup>75</sup> See a similar suggestion for Espionage Act cases, above, p. 323.

<sup>76</sup> 39 United States Code, sec. 259. See Acheson Post Office Monograph, pp. 18, 23-30.

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ficial needs to act so fast that he should not be made to wait for a hearing.<sup>77</sup> For example, he can summarily kill diseased cattle or pull down houses in the path of a conflagration. I have already spoken of the policeman who sees a grossly indecent theatrical poster on a billboard and can lawfully tear it off without letting the defense present evidence. The only alternative is to leave the picture exposed to all passers-by while a tribunal solemnly deliberates. An emergency exists which demands an extraordinary remedy.

Is there any such great hurry about an exclusion case? The postmaster does have to move quickly to stop the book from going to its destination. I agree that it would be futile to let the item be mailed and then spend days or weeks in hearings to decide whether it was obscene and ought not to have been mailed. But, once the book has been seized, why is the government pressed for time? The way out seems obvious. Hold the book while you hold hearings. Then the government loses nothing if it ultimately proves its case. Of course, the publishers do suffer by the delay involved in hearings; if they win, the book or periodical will go out very late. Yet how is the publisher then worse off than if the item is permanently banned without any hearing at all, when by hypothesis it would have been passed after a hearing? Better for the publisher to win late than never!

Second, it is contended that a hearing would do no good. The Acheson Post Office Monograph was doubtful whether a formal hearing with both sides presenting evidence would accomplish much even in revocation cases.<sup>78</sup> Witnesses for the defense would be useless to explain away the questionable

<sup>77</sup> See *Lawton v. Steele*, 152 United States Reports 133 (1894).

<sup>78</sup> Acheson Post Office Monograph, pp. 13-14. This was published in 1940, before the 1942 rules had established formal hearings in revocation cases.

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book or picture. "The very *res* in controversy ordinarily speaks for itself. Although characterization of the text as obscene or treasonable may involve more delicate questions of personal judgment and discretion than determination of whether the publication is 'formed of printed paper sheets, without . . . substantial bindings,' both determinations can be made by scrutiny of the matter at hand." My reply is that this may often be true, but not always. Experts in literature or art can sometimes bring out the merits of the item and produce classics for comparison. And the chief value of a hearing will be the publisher's privilege of having an able lawyer argue about the dangers of suppression. No doubt, the great mass of suppressed items consists of sheer pornography, for which nothing can be said. Probably nothing will be said; the publisher will not incur the expense of a lawyer but let the case go by default and hope to escape a criminal prosecution. But it is the border-line cases which interest us. There the publisher will often desire a hearing, and arguments of counsel are badly needed. An official should not dispense with help when he passes on a delicate adjustment between the claims of morality, on one side, and the claims of freedom and literary or artistic merit, on the other side. Counsel can make him realize the full consequences of suppression in the particular case, which the official might otherwise overlook. Therefore, even if informal methods of adjudication are continued without the introduction of any evidence except the publication itself, the Post Office should surely follow the final recommendation of the Acheson Committee about obscenity cases: "Oral argument should . . . be preserved and employed on this issue."<sup>9</sup>

<sup>9</sup> *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 152. Although the Committee was speaking of revocation



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Another phase of this objection is that a hearing will not influence officials who have already made up their minds to ban the book, as is proved by their initial order detaining it in the post office as obscene. "The question of what is obscene . . . is a matter of departmental policy and it is doubtful whether a parade of witnesses or even oral argument would, in the very nature of things, affect that determination of policy where, through . . . citation to show cause . . . , *the policy has already been set out in the particular case.*"<sup>80</sup> That is, the very fact that the Department charges obscenity foreshadows the decision after a hearing. "If . . . after tentative determination prior to a hearing, the Department wishes to sustain its position at a hearing, it could in the best of faith always find witnesses who sincerely believe the matter to be obscene; thus, it could produce evidence to support its ultimate conclusion. Under such circumstances, a formal hearing at which there is testimony would be an empty gesture. The Department, therefore, seems to be justified in dispensing with formal hearings. . . . Conference in satisfaction of the statutory requirement of hearings . . . may or may not be useful; at least discussion concerning particular printed material seems more helpful than adversary hearings."

This quotation from the Acheson Monograph is a terrible indictment of unfairness in postal officials. It reminds me of the story of the "ideal jurymen," who used to declare that his guiding principle was: "I look at the prisoner in the dock and say to myself—'If you didn't do it, what are you there for?'" Yet, whatever was true when the Monograph was published

cases, its reasons are equally applicable to exclusion cases. Observe that this conclusion of the Committee in its Report differs from the view of the Monograph, which was written by the staff in order to aid the Committee.

<sup>80</sup> Acheson Post Office Monograph, p. 14. (My italics.)

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in 1940, it certainly is not fair to say after the *Esquire* case that the postal officials are likely to close their minds when they start a proceeding. Two members of the hearing board in that case decided against revocation. Though Mr. Walker was not convinced by the *Esquire* lawyers, he pondered all they said. Furthermore, this case shows how segregation of functions lessens the danger of a closed departmental mind. The official who presented the government's case had to adopt a definite slant against *Esquire* from the start, but the three officials who decided were an independent group.

Therefore, since the practical objections do not appear to be strong, I hope that a hearing will be held in exclusion cases whenever the publisher requests it, and that rules of procedure will be promulgated for exclusion cases, regulating the details of notice, hearing, etc., just as they were regulated for Classification by the 1942 rules. The successful operation of formal hearings under those rules, despite the doubts of the Acheson Monograph, indicates the desirability of such hearings in all cases of obscenity.

*Problem 3. Should the Postmaster General hold a fresh hearing when he reviews the record and the findings of the subordinate officials?*—The point was not discussed in the Acheson Monograph in connection with obscenity,<sup>81</sup> but it is worth con-

<sup>81</sup> See, however, the comment in the Monograph, p. 33, on the procedure in fraud order cases, where the hearing officer's findings are reviewed by the Solicitor; the defendant may argue once, to either of these officials, but cannot argue to both successively. The Monograph contrasts the situation in ordinary criminal cases before a jury, where "it is true that the defendant is limited, after the presentation of the evidence, only to oral argument, but there the argument is addressed to the very persons who heard all the evidence and who make the determination. In the fraud order cases, the respondent's oral argument, on the other hand, is made either to the hearing officer, who does not finally make the findings, or the Solicitor who has not heard the evidence, and has not yet become familiar with the record."

Compare *Morgan v. United States*, 298 United States Reports 468 (1936), 304 *ibid.* 1 (1938).

sidering. Such a fresh hearing would rarely admit new evidence—the first hearing gave sufficient opportunity for witnesses and exhibits—but it would have the advantage of letting the Postmaster General hear arguments and not merely read those made to his subordinates. Since it is his mind which will finally decide, he will make it up better if counsel follow the play of *his* mind and answer *his* questions and try to remove *his* doubts. So it is not enough that counsel had one chance to argue—that was to other men's minds. The United States Supreme Court would not refuse to hear oral arguments on the ground that the lawyers had had their day in court before inferior judges.

On the other hand, this second chance to argue is often denied in administrative proceedings. The parties may not even be allowed to state in writing their objections to the administrative findings and decision which are going to be reviewed by the high official, and their reasons why he should alter or affirm the action of his subordinate.<sup>82</sup> Arguments take time, and the heads of government departments have not much time. Attorney General Biddle heard no arguments when he reversed his Immigration Board of Appeals, and ordered Harry Bridges deported.<sup>83</sup> He probably thought that he had

<sup>82</sup> This practice is abolished by the Administrative Procedure Act of 1946 whenever the hearing undergoing review was ordered by statute, as in revocation cases. See sec. 8(b), of which the House Report says: ". . . Briefs on the law and facts must be received and fully considered by every recommending, deciding, or reviewing officer. They must also hear such oral argument as may be required by law, and the bill does not diminish rights to oral argument. Where the issues are serious or the case becomes one adversary in character, the agency should provide for oral argument before all recommending, deciding, or reviewing officers." But this reform does not apply to postal exclusion cases, unless the Department adopts it voluntarily.

<sup>83</sup> His action was set aside in *Bridges v. Wixon*, 326 United States Reports 135 (1945). The point raised in the text was not discussed by the Court.

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done enough by going through voluminous documents already seen by his subordinates, without absorbing new briefs and more talk. The Postmaster General may also feel that he is too busy carrying thirty-two billion pieces of mail to listen for several hours to wrangling lawyers every time a publisher is aggrieved by the stoppage of one display of risqué humor or lascivious legs.

One can agree that a Cabinet officer ought to be relieved of such a task. The country needs him elsewhere. Yet if a Cabinet officer makes a decision vital to freedom of opinion, as in the *Bridges* or *Esquire* case, he ought to make his decision in the best possible way, and that means hearing oral arguments. Possibly "due process of law" does not make this constitutionally obligatory, but nevertheless it is highly desirable.

Perhaps the solution is that the Postmaster General should not have to bother with obscenity cases at all. He ought not to take time off even to read pages and pages of exhibits and testimony about a shady book or magazine. Secretary of the Treasury Morgenthau did not take time off from Victory Loans and Federal Reserve Banks and income taxes to read Henry Miller's latest imported novel—he left it to Mr. Cairns and the federal courts. So in the mail problem, whatever man really decides the case should hear oral arguments as well as know all the evidence, but should that man be the Postmaster General? Instead of making his task more onerous by adding more hearings and more oral arguments, better make it lighter by giving the whole job to somebody else.

A somewhat less drastic change is this: If judicial review be established, then the Postmaster General might still keep the power to overrule his subordinates on the record without hearing arguments. The need for a second argument within the Department is less if the Postmaster General does not

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make the final decision. The publisher's lawyer will have a better chance to argue in court. In the Customs, the fact that a judge can eventually determine obscenity simplifies the administrative mechanism and makes it possible for both the Secretary of the Treasury and his Legal Adviser to dispense with all formal hearings and arguments.

*Problem 4. Should postal officials give rulings on obscenity in advance of mailing?*—When Mr. Walker became Postmaster General, he found that for several years the Solicitors of the Department had been passing on magazines before publication. The periodicals were sending their formats to Washington to get advice that they were not indecent, etc. He was appalled by the vast proportions of this practice. Its implications were that the Post Office was putting its imprimatur (official mark of approval) on these magazines. It was acting, in effect, as a censorship board like the English censors in the seventeenth century whose "licensing" Milton opposed. It would be embarrassing if anything bad were afterward found to exist in a magazine so approved. Mr. Walker notified all the publishers that this was no longer to be done. Thus he put an end to the censorship board.

In some areas of governmental regulation, advance rulings are desirable for all concerned. For instance, an importer would like to know the amount of the duty on a given type of merchandise before ordering a large quantity abroad. So long as he states the facts correctly, the ruling benefits him and the government.<sup>84</sup> He gets the goods, and the government gets more taxes. The Administrative Procedure Act of 1946<sup>85</sup> al-

<sup>84</sup> See Acheson Customs Monograph, pp. 69-70.

<sup>85</sup> 5 United States Code, sec. 1004(d). See House Report cited in note 45 above, p. 31. See also the discussion of declaratory rulings in *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), pp. 30-33.

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lows a governmental agency "to issue a declaratory order to terminate a controversy or remove uncertainty"; but it is to do so "in its sound discretion," which precludes the issuance of improvident orders.

Businessmen like administrative licensing beforehand, in other fields as well as in communications, but the practice sometimes turns out to be objectionable to other persons whose interests are affected thereby. An interesting example took place several years ago with regard to corporations which were planning a merger or an association to exchange trade information and desired to remove the uncertainty caused by the indefinite language of the Sherman Act. When William J. Donovan was in charge of the Antitrust Division of the Department of Justice, he allowed the corporations to submit the proposed scheme to him and get his approval in advance. This relieved them from the fear of prosecutions or dissolutions. Donovan thought the practice showed common sense. It certainly saved a lot of time and worry to both sides. On the other hand, the government might find its hands tied morally if it later found the scheme operating to the injury of the public. A new administration might have very different views of the corporate combinations which its predecessor had approved. After Donovan left office, the practice was abandoned.

In the communications field publishers and booksellers and theaters are similarly eager for advance information. It is much easier to revise a book before publication or a play before the run starts than to defend a prosecution later. Changes in a book or magazine are very expensive after it has been plated and put on sale. This is why Boston booksellers often like the idea of the Watch and Ward Society, which can tell them to go ahead and sell the book without much danger

of police interference. Yet we have seen that much evil results from advance licensing of books by local authorities.<sup>86</sup> This is partly due to the fact that the law intrusts the determination of obscenity to a jury, which has no part whatever in the advance rulings.

The acceleration of the time of a decision is somewhat less dangerous when the same person makes the decision who would do so anyway. This is the situation in the Customs, where Mr. Cairns occasionally rules on a questionable book before the importer has gone to the expense of bringing a large number of copies from Europe.

"The Bureau is extremely cautious in giving advance rulings in this field because applicants sometimes desire its opinion not for a bona fide purpose but rather for use in some other connection. Thus a publisher may contemplate a publicity campaign in which he hopes to excite the interests of the reading public by indicating that the book is sufficiently questionable as to require its submission to the Bureau for ruling on the issue of obscenity. Or a person who is defending a proceeding brought against him by local officials may desire a Bureau ruling for use at the trial as evidence of the non-salacious character of the book. Before a declaratory ruling is given on a book, therefore, [Mr. Cairns has] satisfied himself . . . that the ruling is sought solely in connection with an intended importation of the book in question."<sup>87</sup>

The ultimate possibility of court determination of the obscenity of imported books prevents unwise advance rulings in the Customs from permanently impairing the access of readers to books. In the Post Office, however, the risk of harm is much more serious because any administrative mistake is final; the

<sup>86</sup> Above, pp. 226-28.

<sup>87</sup> Acheson Customs Monograph, pp. 51-52.

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sooner it comes, the greater its effect in cutting down the circulation of the book. Consequently, the public had even more reason than Mr. Walker to object to advance rulings on obscenity for the sake of serving the convenience of publishers. The fact that a censor usually decides before publication is a main reason why the historic struggle for freedom of the press has been so largely directed against censorship. The public does not like to have books and periodicals systematically stifled before it has a chance to read them. So Mr. Walker did well to abolish the practice.

### B. SEGREGATION OF FUNCTIONS

"I'll be judge. I'll be jury,"  
Said cunning old Fury;  
"I'll try the whole cause,  
And condemn you to death."

—*Alice in Wonderland*

The principle that no man should be judge in his own case is obvious but not easy to observe in administrative law. A single body is charged with duties of legislating by framing rules, prosecuting the supposed violators of the rules, and deciding whether they are really violators. All three functions are assumed to require expert knowledge of the single field intrusted to the commission or board—interstate commerce, trade practices, irrigation, agriculture, etc. Without careful organization, the deciding function is likely to drift into the hands of the same person who makes the rules and ferrets out violations of his own rules. Under such circumstances the fairest of men is liable to bias in favor of the government.

Segregation of functions within the administrative body reduces the danger of bias. The three functions are distributed among different subdivisions of experts. Thus when the agency has to determine a controverted issue, one official pre-



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pare the government's charges and supports them at a hearing while a different official<sup>88</sup> makes the decision after hearing the complaining official and the counsel for the private citizen whose liberty or property is at stake. This segregation is very important and is maintained in such federal bodies as the Interstate Commerce Commission and the National Labor Relations Board. In the NLRB the judging officials are so anxious to preserve independence by separating themselves from the enforcing officials that they even travel from headquarters to a hearing by separate trains. On the other hand, segregation is disregarded in many state commissions;<sup>89</sup> and in the past, at any rate, it was not observed in deportation proceedings in the Bureau of Immigration.<sup>90</sup>

On controversial questions of policy, segregation cannot attain a completely impartial attitude in the deciding officials like that possessed by court judges. The choice of a major policy almost inevitably affects everybody in the administrative unit, particularly the more responsible officials. If they did not believe in the value of this policy, they would have refused office. For example, a high official in the National Labor Relations Board would not be where he is unless he were sympathetic toward labor unions as now constituted, and this attitude persists even if he is assigned to decide disputes between a union and an employer. Nevertheless, he will be much more likely to make a fair decision than if he had previously drawn the complaint or collected the evidence against the employer.

In discussing the present practice as to revocation of sec-

<sup>88</sup> Either function may be exercised by a group of officials rather than a single official.

<sup>89</sup> See Chafee, *State House versus Pent House* (1937).

<sup>90</sup> See FSUS, pp. 198 ff.

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ond-class rates, I have already described how well the 1942 Rules and the recent Administrative Procedure Act set apart the hearing officer who makes the decision from the trial attorney who prepares and conducts the government's case. Even before this Act, segregation was admirably preserved in the *Esquire* case up to the time when the Postmaster General intervened in the decision. The government's charges were supported by the Solicitor of the Post Office Department and opposed by counsel for *Esquire*. Both sides introduced witnesses and exhibits at hearings lasting over a fortnight. The deciding function was vested in a board of three hearing officers, a majority of whom made recommendations in favor of *Esquire*.

In exclusion cases for obscenity, on the contrary, one man on the Solicitor's staff apparently orders the initial detention of the book, corresponds or confers with the publisher, and then advises the Postmaster General how the case should be decided.

*Problem 5. Should segregation be employed in exclusion cases?*  
—In the Post Office the reasons for segregation seem especially good:

First, the issues to be decided which involve news and ideas are usually remote from the major policies of the Administration in office in the White House. This may be somewhat less true of violations of the Espionage Act, which concern the President and the Attorney General and perhaps the whole Cabinet; whatever policy they adopt tends to filter through the whole Post Office Department regardless of segregation, though even here the present practice of holding hearings on the issue of low postal rates encourages impartiality in the deciding officials. When we turn to obscenity, we are plainly remote from policies of the Administration, and its

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suppression is not likely to be a main concern of the Postmaster General. It is just a side issue in the great business of expediting tons of mail.

Second, segregation is easier in a great administrative group like the United States Post Office Department than in a small group like the Rhode Island Racing Commission<sup>21</sup> or the New York Boxing Commission. When there are only a few high officials in the body, you cannot afford to spread them all over the lot and have one to prosecute a case and another to judge it. It may be bad enough to have just one man spending days over this single case. But in a great group there are enough good men to go around, and it is worth while to make them specialize. The practicability of segregation in the Post Office is proved, not only by its use in revocation proceedings since 1942, but also by the much longer experience of the Department in fraud-order cases where formal hearings have been held for many years though not required by statute. Despite some impairment of the independence of the hearing officer by his consultations with the trial attorney of the Department during the preparation of the decision, much good is accomplished by the mere fact of their physical separation at the fraud hearing. The trial attorney is at floor level opposite the defendant's lawyer, while the hearing officer sits on a dais like a judge in court. Somebody looked at the two officials and remarked: "You'd be surprised at the difference in approach between the man down here and the man up there."<sup>22</sup>

Third, segregation is especially desirable where freedom of speech is involved. In that field the man who decides needs to be shaken out of his personal preconceptions. Argument be-

<sup>21</sup> Above, n. 89.

<sup>22</sup> Acheson Post Office Monograph, p. 34.

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tween two opposing counsel will show him how much there is to be said on both sides which had escaped his previous thinking. It is hard to achieve objective impartiality on such issues when one sits merely as a judge. If he be both judge and prosecutor, impartiality is well-nigh impossible.

Furthermore, on free-speech issues, men are likely to think and talk extravagantly. Now it happens that we are quicker to spot other people's excesses of zeal than our own. If A as judge hears B arguing for the government, A may feel that B is running away with himself when B makes the very argument which A would make if he were prosecutor. On his own lips it would sound all right, but on another's it sounds overheated. A becomes critical—he seeks some contrary argument which B has ignored.

Therefore, I venture to recommend that the Postal Rules should be amended to order, in all cases involving charges of obscenity, the segregation of functions which is now required in Classification cases. This should include abstention from any consultations between the hearing officer and the trial attorney about the decision, as the Administrative Procedure Act directs. Even though this Act does not govern exclusion cases, its admirable provisions should be applied voluntarily.

One troublesome question still remains: Where does the Postmaster General fit in? Segregation seems to vanish as soon as the case goes to him for review and final decision. As head of the Department he naturally dictates important policies. Suppose he says, "Let's get after dirty books more energetically." This lessens his impartiality. In short, he is really chief prosecutor. Should he also be chief judge?

## II. WHO DECIDES?

This is a more important question than mechanism, as the Acheson Monograph recognizes in a passage which is set forth

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at length, because it raises most of the remaining problems which I intend to discuss in connection with the Post Office.

“The conclusion is inescapable that ‘procedure’ is not the real issue. Although the Supreme Court has provided guides as to what constitutes ‘obscenity’ as used in the postal statutes, it is difficult to escape the conclusion that obscenity is ‘largely a question of one’s own conscience.’ The important question, then, is whose conscience it is, and what manner of man he is. Yet the accidental quality of the personal element may at least in a measure be avoided by a deliberate choice of expert advice. The experience of the Customs Bureau of the Treasury Department is revealing: Goaded by the clamor arising from a series of egregious blunders in respect of exclusion of what some of its employees took to be obscene, the Treasury Department some years ago adopted the practice of submitting questionable material to an enlightened connoisseur of the arts and literature upon whose advice it leaned heavily. Subsequently, he was retained by the Treasury Department, but although the bulk of determinations are now made by him, his is not always a personalized and individual judgment. Rather he turns to experts for advice. If the matter in issue purports to be a scientific work, but may be pseudo-scientific and simply pornographic, the work is submitted to expert scientists in the field who can readily distinguish the educational impulse from the pornographic. Humility and a recognition that a proper determination of what is obscene requires a knowledge so wide and a sympathy so broad that one man is unlikely to be able, without outside assistance, to undertake the task, seem the best safeguards against administrative aberrations in this field. At present, the Post Office Department’s determination is made without any canvass of outsiders’ opinions. It may be possible for it to appoint panels

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of experts—scholars in the field of art, the sciences, literature, and sociology—to whom it may turn for opinions and recommendations. Even if no formal advisory panels should be created, it would seem desirable for the Post Office Department to emulate the Treasury's policy of informally seeking outside advice. In the great majority of cases coming before the Post Office Department, it is doubtless true that there is no question; it is in the exceptional case, however, that the utmost of care is required since it seems just as important to protect the public from the truly obscene masquerading under the guise of art or science as it is to guard against the public's being deprived of that which is not lewd, but artistic or scientific. Experts in these fields would seem to be best equipped to aid in the delicate adjustments required."<sup>93</sup>

Without confining myself to the proposals just quoted, I list all the possibilities which suggest themselves for the personnel to determine obscenity in the mails:

1. The Postmaster General (as now required by law).
2. One or more officials primarily chosen for other postal work (the actual situation in most cases, by necessity).
3. A postal official primarily chosen for this work, perhaps on part time (recommended by the Acheson Monograph).
4. An over-all board of officials for all Departments and Commissions controlling freedom of communications.
5. A panel of outside experts appointed by the Post Office (recommended by the Acheson Monograph).
6. Outside advice informally sought by the Post Office (recommended by the Acheson Monograph).
7. A jury.
8. A United States judge.

The last two types really raise problems of judicial review, which I shall take up later. Even if such review be established by statute for the mails, just as it now exists for imported

<sup>93</sup> *Ibid.*, pp. 14-15. See chap. 12 on Mr. Cairns as censor in the Customs.

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books, nevertheless the experience of the Customs as already described makes it both probable and desirable that the great bulk of decisions about obscenity will continue to be made administratively. Hence, I shall begin with the first six types successively, in order to see what kind of persons should be selected to make these decisions on behalf of the Post Office Department.

The subsequent discussion will include determinations of nonmailable obscenity for the purpose of either exclusion or revocation of second-class rates. Although the present mechanism for revocation hearings is much better than the informal disposition of exclusion cases, still it is possible that the decisions about low postal rates would be wiser if they were made by a different sort of person than now.

### A. ADMINISTRATIVE PERSONNEL

*Problem 6. Should the Postmaster General decide issues of obscenity?*—Although this is now literally required by law in both exclusion and revocation cases, the initial task of decision is usually delegated to one or more subordinate officials (our next problem). Thus the present problem shrinks to the question whether the Postmaster General should retain his full power to review and set aside the decision of such subordinates.

Several arguments for the negative have already been indicated: He is too busy to give the time it takes now and the greater time it ought to take in many cases. He is partially disqualified because of his concern with enforcements. A Cabinet member who changes every few years should not automatically be given the sole power to pass on obscenity regardless of his personal qualifications for judging such issues. It is a question for a philosopher and student of art and literature, not for a business executive and presidential campaign man-

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ager. Probably any Postmaster General would be glad to be relieved of this uncongenial job.

The only argument to the contrary worth considering is that the Postmaster General, as head of the Department, ought to assume responsibility for the administration of this postal statute. Yet even this argument does not really require him to decide the issue of obscenity himself. It is significant that Congress has never expressly told the Postmaster General to sit as a judge in any sort of obscenity case.<sup>94</sup> The Postmaster General will have sufficiently discharged his responsibility under this statute if he takes pains to arrange that obscenity cases will be determined by qualified persons after a fair trial.

Once a satisfactory procedure has been established, the Postmaster General ought not to be bothered by individual cases. The most that he should have to do personally is to exercise a sort of pardoning power whenever he feels that the administrative tribunal has been overrigorous in deciding some book or magazine to be nonmailable which has recognized literary, artistic, or scientific merit. This dispensing power is comparable to the discretion possessed by the Secretary of the Treasury to admit imported books under the proviso.<sup>95</sup> We have seen that a decision by a customs official admitting a book is never reversed.<sup>96</sup> The Secretary of the Treasury merely reviews decisions *against* a book. It seems equally safe for the Postmaster General to accept the decisions of his subordinates that matter is mailable and just step

<sup>94</sup> His power to do so arises only from judicial interpretation of general statutory language (see above, n. 50). Furthermore, the idea that the Classification Act had anything to do with obscenity did not arise until the *Milwaukee Leader* case in 1921.

<sup>95</sup> Above, p. 251.

<sup>96</sup> Above, p. 255.



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in at rare intervals to be sure that their unfavorable decisions are wise.

Although an amendment of the statute might be necessary to give this discretion to pardon what is ruled to be "obscene," the general policy of the Postmaster General's abstention from deciding obscenity cases could be put into force as a matter of internal administration without congressional action.

*Problem 7. Should the decision as to obscenity be made by postal officials primarily chosen for other postal duties?*—This will be the general situation if, as just suggested, the Postmaster General abstains from passing on obscenity. It is already the usual practice. The actual determination of obscenity is made in most cases by one or more subordinates, and the Postmaster General merely signs the necessary papers. His direct participation is likely to be limited to a few cases, like that involving *Esquire*, which are either important in themselves or the starting-point for a long series of similar decisions. In any event, it is certain that the spadework must be done by subordinates, and their recommendations are bound to carry weight even when they are reviewed by the Postmaster General. Therefore, it is very important to know who these subordinates are and how far down the scale they happen to be.

Here we must once more distinguish between revocation cases and exclusion cases.

When low postal rates are at stake, the present requirement of a formal hearing brought about a pretty good selection of hearing officers while Mr. Walker was Postmaster General. They were drawn from a panel of twelve to fifteen men, taken from the office of the Third Assistant Postmaster General, which passes on second-class rates. Apparently these men

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were well up the official scale and were put on the panel with attention to their qualifications for dealing with questions affecting freedom of the press. Some of them, at least, were graduates of colleges where they had a chance to become familiar with classics which discuss problems of sex. Hearing officers of this sort sat in the *Esquire* case, and a majority decided against revocation. So far as I know, a similar panel has been used since Mr. Hannegan replaced Mr. Walker as Postmaster General. It is to be hoped that a thoughtful selection of the panel will be maintained by their successors.

In exclusion cases the present situation seems to be less satisfactory. Not only are the prosecuting and deciding functions united in a single official in the office of the Solicitor, where the prevailing atmosphere is unlikely to be imbued with judicial impartiality, but also there is no assurance that such an official is so systematically selected or so high in the scale as the panel for passing on the same issue of nonmailability in revocation cases. Of course it is possible that the exclusion personnel is just as good, but no information about their qualifications has been made public.

If formal hearings are extended into exclusion cases, as previously recommended, then the problem of personnel will be much altered. The Solicitor and his staff will probably continue to handle the government's case for nonmailability just as they now present its case for revocation of low rates, but it will not be so easy to pick out suitable hearing officers. The men on the classification panel would be qualified for the task, but the trouble is that they belong in the office of the Third Assistant which deals with second-class rates for periodicals and has nothing to do with nonmailability in general, especially for books. Yet it would be convenient to use the same set of men for all obscenity cases, whether the proposed pen-

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alty be no mailing or expensive mailing. Very likely this practical question would be ironed out by the postal officials without much trouble.

It would be a good plan if the membership of the panel used for deciding revocation or exclusion cases were made public like the membership of a court or the Board of Tax Appeals, so that the qualifications of these censors could be freely discussed in the press. Reports of their decisions should be published, at least in contested cases, because this leads to more careful reasoning.

One more difficulty with the present situation is raised by the long passage quoted from the Acheson Monograph. The censors are men who were originally appointed to their positions with other purposes in mind than censorship. The Monograph advises the deliberate practice of bringing into the Post Office Department one or two men who are well suited to be censors, just as Mr. Cairns was brought into the Customs. One possible objection to this suggestion is that the two postal powers involve many more charges of obscenity than the Customs has to pass on. Much more dirt originates inside the country than gets imported. Mr. Cairns could clean up his Customs job in an hour or two a week. Would a similar job in the Post Office require the full time of more than one man? Even so, it seems likely that one expert like Mr. Cairns could head an office of nonexperts. They could take care of the mass of obscene cases which are plainly pornographic, and refer the border-line cases to him. The expert might act as chief of the hearing officers, a sort of presiding judge. Or he might, like Mr. Cairns, have more of a roving commission and sift out the cases before formal adjudication, thus greatly reducing the number of cases which have to go to a regular hearing. The feasibility of the latter plan depends a good deal

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on whether judicial review is established in the Post Office as in the Customs. Without judicial review, it is conceivable that two experts might be needed for obscenity cases, one for chief hearing officer and the other to determine what publications ought to be charged with being nonmailable. Many of these precise details will have to be worked out, but in any event the advice of the Monograph deserves careful consideration. Perhaps Mr. Cairns could be temporarily borrowed from the Treasury in order to study the postal situation and report to the Postmaster General.

*Problem 8. Should there be an over-all board of experts trained for the task, who would determine obscenity and other issues for all the departments and commissions controlling freedom of communications?*—Since the Post Office, the Customs, the Federal Communications Commission, and the Department of Justice all make decisions pertaining to freedom of communications, the suggestion was made to the Commission by well-informed persons that it might be good to have a single board serve all these agencies in this connection. If such a board were purely advisory and existed for the sake of making recommendations to the respective deciding officials in the various departments, who could then follow them or not, as they pleased, we should run into considerations about the utility of outside experts, which will soon be discussed under Problem 9.

Consequently, I shall now assume a board of experts vested by Congress with power to decide specified issues affecting free speech, such as obscenity. Legislation would be required to transfer to this new body the powers now intrusted to the Postmaster General over obscenity in the mails, the Secretary of the Treasury over obscenity in the Customs, the Federal Communications Commission over obscenity in the radio, etc. For example, Mr. Cairns and two other men equally well

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qualified might serve on this new statutory board. They would extend to the Post Office, etc., the wisdom now exhibited only in the Customs.

Such a plan seems to me undesirable, for two reasons:

First, it resembles the broader proposal, which had considerable support a few years ago in Congress and the American Bar Association, for an over-all "administrative court" (consisting of officials, not judges) which should hear appeals on issues of fact from the decisions in all federal commissions and boards.<sup>97</sup> One big objection to this proposal is that the problems of each commission or board are quite different from those of another—the Securities and Exchange Commission from the Interstate Commerce Commission, etc. No small body of men could possibly be expert in all these fields. Administrative law is not a unified body of knowledge. Congress intrusted the regulation of railroads to the Interstate Commerce Commission because Congress could not know all the details and wanted men steeped in railroading. The Supreme Court interferes very little with the Commission because judges do not know about railroading. The new "administrative court" could not know about railroading either. In short, these new judging officials would not really be experts, but one more court with a special kind of judges.

The objection to what I am considering is less strong, because the body of knowledge to be mastered is less extensive. But it still holds. True, obscenity in the Post Office raises about the same issues as obscenity in the Customs, and Mr. Cairns would handle both jobs well if he had time. But we must throw in many other tasks if the new group is to handle

<sup>97</sup> See Jaffe, "Invective and Investigation in Administrative Law," 52 *Harvard Law Review* 1201 at 1223 (1939).

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decisions in the whole field of freedom of communications. For example, it will have to decide whether a particular broadcasting station owned by the local newspaper should be licensed. This is miles away from obscenity in the mails. The new body could not be really expert in both the Post Office and the radio. It is even hard within the Post Office to be expert in both obscenity and the Espionage Act. If we want over-all control of federal decisions on freedom of the press, we had better drop the thought of experts altogether and put this control in the courts. That would save the expense and uncertainties of a new kind of board. We are back at judicial review.

It is significant that the Administrative Procedure Act of 1946 wholly rejects the notion of an over-all "administrative court," and concentrates instead on improving the methods of adjudication used by the officials inside each particular agency.

Second, the new board of censors would be much more powerful than any existing federal censor, and the dangers of abuse would be correspondingly greater. The board would lack the prestige of a court, so that membership might not attract the men who would make good full-time judges. Mr. Cairns is willing to give an hour or two a week and then go over to the National Gallery for his main work, but would he want to do censoring all day long every day? Instead, you might get the kind of man who does want to be a censor—the man who is censorious.

*Problem 9. Should outside experts be utilized and how?*—The long passage quoted from the Acheson Monograph favored the use of such experts either formally or informally. One possibility (my type 5) is a standing panel of outsiders, say five men, who would become accustomed to make recommenda-

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tions as to the disposition of obscenity cases. A simpler plan (my type 6) is for the postal officials to imitate the practice of Mr. Cairns in the Customs and go to various outside experts for help whenever it seems advisable.<sup>98</sup> This is the plan which the Final Report of the Acheson Committee preferred:

"Obscenity is largely a question of judgment which often may require a broad sociological expertness. The Committee recommends, therefore, that the Department consult outside experts, scholars in the field of art, the sciences, and literature, as the case may be, in order to obtain their opinions prior to ultimate determination."<sup>99</sup>

However, officials of the Post Office Department believed in 1940 that neither plan was feasible. Their objections<sup>100</sup> may be summarized as follows, with my comments in parentheses:

First, an artist or connoisseur apparently thinks there is no such thing as obscenity and so is disqualified to act as a judge. (The work of Mr. Cairns in the Customs disproves this objection.)

Second, writers will not pass accurately on the work of other writers, nor will critics, because they hope to be writers. There will be a lot of back-scratching instead of genuine judgment. (Mr. Cairns again shows this not to be true.)

Third, a legal obstacle is, that under the Constitution Congress makes the laws and the President (with the assistance of the various departments) is charged with their execution. Federal officers take an oath that they will "well and faithfully discharge the duties of the office" undertaken. Reference of questions to a panel would permit the substitution of the judgment of the members of the panel for that of the officer

<sup>98</sup> See above, pp. 263, 348-49.

<sup>99</sup> *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 152.

<sup>100</sup> They are stated in full in Acheson Post Office Monograph, pp. 42-43.

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charged with the duty of administering the law. This delegation of official duties to outsiders would violate the official oath. The courts might hold this to be an unauthorized delegation of power seriously affecting the property rights of citizens. Furthermore, the panel would not be so careful as officials to follow judicial interpretations of statutes, and the courts would object, on this account, to panel decisions. (In so far as this objection has weight, it applies only to panels and not to informal consultation of outsiders, whose recommendations may be followed or disregarded as the official thinks best.)

Fourth, the Post Office Department is under constant pressure from persons who believe in greater rigor. If the Department should act on the panel's advice and rule against obscenity, and then a local prosecution should hold the publication obscene, the "Department might be greatly embarrassed." (This seems to me fanciful. What does the Department care about police judges or even the highest state courts? It often allows matter to go through the mails despite sporadic local convictions, for example, *Strange Fruit*.)

Fifth, the mass of work is too great for a panel. Thousands of rulings on mailability are made each year. Publishers would be embarrassed if such matter had to be submitted to a committee of outsiders. Either the panel would have to be meeting constantly; or else some would gather one time and others the next so that continuity would not be maintained, for the members would show the same disagreements about obscenity as does the rest of the world. (The panel would be called in for only a few border-line and contested cases. Much of its work could be done by correspondence.)

Sixth, how is the panel to be chosen? If you pick a minister to represent the clergy and an artist to represent the artists,



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how do you know that he shares the views of a majority of his colleagues? (See below.)

Seventh, if the panel contains ministers and artists, they will clash frequently. A truly group decision will not be reached, and compromise decisions are impossible for this sort of subject matter. A definite decision must be made that the item is or is not mailable. (See below.)

Eighth, delays caused by reference to outsiders would create great hardship in many instances. (Yet delays by experts are better for the publisher than an uninformed official's hasty ruling of nonmailability.)

In so far as any of the foregoing objections hold up, they apply much more against a panel than against informal consultation of outside experts. I agree in thinking a standing panel undesirable. It is plain under the statutes that outsiders cannot do more than recommend; the actual decision must be made by an official. I doubt whether a panel of outsiders would work steadily on case after case, knowing that they had no real power. And remuneration is also a difficulty.

The objections of the Department did not prevent the Final Report of the Acheson Committee from advising informal resort to experts, and I hope that the Post Office will eventually follow this advice. My own view favors a combination of my types 3 and 6—that is, occasional consultation of outside experts by a permanent inside expert like Mr. Cairns and by other postal officials. In addition, whenever a formal hearing is held which involves the issue of obscenity, the hearing officer should feel at liberty to supplement the expert testimony on both sides by calling scholars in whom he has confidence as *his* experts, subject of course to cross-examination by either party. This suggestion accords with a reform of criminal and civil courtroom trials which is steadily winning

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support, that the judge may appoint one or more expert witnesses of his own selection.<sup>101</sup>

### B. JUDICIAL REVIEW

The desirability and the proper scope of judicial review of postal decisions on obscenity is hard to discuss because so much depends on the administrative mechanism and personnel upon which the courtroom mechanism is superimposed. In exclusion cases, for example, it is important to know whether there will be an improvement in the persons who decide and informal consultations of outside experts, or whether everything is to remain as it is now. Revocation cases have to be considered separately because the review will follow a formal administrative hearing and because it is always required by the Administrative Procedure Act of 1946, although its scope is more limited than the judicial review which Congress has required for the Customs. Because of these complicating factors, I shall not attempt to cover the topic exhaustively but shall merely present a few problems which raise the significant considerations.

*Problem 10. Is judicial review desirable in postal exclusion cases?*—Since the issue of obscenity here is exactly the same as in the Customs, a court seems equally capable of deciding it if the publisher so wishes, unless the nature of the Post Office involves some special features which differentiate the mailing of books and magazines from their importation. Objectors will perhaps point to two differences as significant: (1) The Post Office receives a much larger volume of questionable publications than the Customs. (2) Nobody expects speed in the arrival of matter from abroad, but speed is essential in the mails, especially for magazines where regular delivery is ex-

<sup>101</sup> It is so provided in the American Law Institute's *Model Code of Evidence* (1942), pp. 202-10, quoting the Uniform Expert Testimony Act to the same effect.

pected by the subscribers and the newsstands. Consequently, it may be contended that judicial review is well enough for imported books but too slow to handle the volume of postal traffic.<sup>102</sup>

Still, I doubt whether these differences in the facts warrant a great divergence in procedure. A few court cases like the *Ulysses* decision will suffice to set the standard for the Post Office as they did for the Customs, where not a single case has gone to the courts since Mr. Cairns took office. Once good official method and personnel are established, most cases will end in the Department. Judicial review, as we have seen, is one of those devices which tend to make themselves unnecessary. The mere fact that the remedy exists is enough. In the Customs, administration was very haphazard until the Tariff Act of 1930 enabled the courts to upset a few arbitrary official rulings, and then the Treasury got Mr. Cairns. In the same way, apprehension of court proceedings may bring about internal reforms in the Post Office and make the publishers willing to accept almost all adverse official decisions. Then it will be easy to take care of a few cases in court.

Let us consider the main objection to judicial review in administrative proceedings generally, namely, that a court is unfitted to do work which requires expert knowledge of the regulated business. This is pertinent to some postal controversies over second-class rates: Is the publication a periodical or a book? Does the advertising matter swamp the text? But the objection does not apply to an issue like obscenity, with which the courts are very familiar.<sup>103</sup> Judicial precedents are numerous, and a greater continuity of doctrine can be main-

<sup>102</sup> The same objection of slowness has been raised against administrative hearings in the Post Office (see above, pp. 333-34).

<sup>103</sup> For the same reason judicial review of postal cases under the Espionage Act seems appropriate (see above, p. 322).

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tained by judges than by administrators whose views vary with the particular men in office. Indeed, judges are more likely to be experts on obscenity than are ordinary postal officials.

If the Post Office continues to decide exclusion cases as it does now, then judicial review is indispensable. The country cannot afford to go on leaving freedom of the press in the uncontrolled hands of officials who disregard elementary requisites of fairness, combine prosecution with judging, lack any specific training or qualifications for passing on art or literature and yet reject the possibility of help from outside experts. Such a situation makes it imperative for Congress to authorize the courts to step in, just as the Tariff Act of 1930 ended the old Customs black list.

There will be somewhat less need for court participation in exclusion cases if administrative personnel is improved and outside experts are consulted informally. Even then, postal censorship will still go on through private investigations by officials, with no chance to get the publisher's side except in correspondence and conversations. No doubt, this is about what Mr. Cairns does in the Customs, but a main reason why the censorship of important books works so well is that court action is always just around the corner. Postal censorship might be kept on a high level by a similar incentive. So long as no formal administrative hearings are held, a courtroom trial ought to be available. Whenever liberty of the press is at stake, there ought to be some place where both sides can present testimony and make oral arguments before an impartial trier of the facts, who is completely dissociated from the preparation of the government's case against the book or magazine. If this thorough adjudication of a postal charge of obscenity is not going to take place in the Post Office Building

in Washington, then the publisher should be able to go to a courthouse.

Finally, suppose a full administrative hearing is granted in exclusion cases. Then the situation will be the same as in revocation cases and can best be considered at the close of the next problem.

*Problem 11. What should be the scope of judicial review of official decisions revoking second-class rates on the ground of obscenity?*—In 1931 Chief Justice Hughes and the majority of the Supreme Court refused to let the state of Minnesota punish the past misconduct of a periodical by stopping its future business.<sup>104</sup>

In 1946 neither the Court<sup>105</sup> nor Congress seems likely to prevent the Post Office from doing practically the same thing.

Although the power to take away low postal rates for past obscenity is unshaken, at least the procedure for determining obscenity is reasonably good on paper. The statute requires a hearing; the postal rules make this a very fair hearing; and a limited judicial review is allowed by the Administrative Procedure Act of 1946 if legal errors have been committed or if the official finding of obscenity is "unsupported by substantial evidence."<sup>106</sup> Yet the question as to what human beings participate in the decisions inside the Post Office remains very important. The best possible procedure cannot offset a lack of literary and artistic expertness. It is true that the hearing officers in the *Esquire* case were selected with such expertness in mind, but there is no assurance that officials of similar qualifications will be used in future hearings or will even be available within the Department. And outside scholars are not consulted.

<sup>104</sup> *Near v. Minnesota*, 283 United States Reports 697 (1931); FSUS, pp. 375-81.

<sup>105</sup> See the comments in *Hannegan v. Esquire*, above, n. 39.

<sup>106</sup> 5 United States Code, sec. 1009(e)(B)(5).

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If expertness is not used in the preliminary siftings and the formal hearing, then the limited judicial review which now exists for the Post Office is not satisfactory. It ought to be just as wide as it is for the Customs, where the court tries the issue of obscenity afresh without being bound at all by what has happened in the Department. Judges are by no means perfect, but they are better guardians of civil liberties than officials. We should always be troubled when freedom of the press is subjected to an official decision which cannot be corrected by the courts. Indeed, it seems possible that this consideration should lead to full judicial review even if the present procedure of full hearings on revocation cases is supplemented by improvement in personnel.

My proposal is that Congress grant full judicial review in obscenity cases and the present limited judicial review in other revocation cases. It is a little difficult, I admit, to sever second-class issues of nonmailability from questions of regular publication, amount of advertising, lack of board covers, etc., which ought to be settled by officials. However, I think that this can be done. Something of the sort has already been accomplished in the Customs, where obscenity is completely tried in the courts and yet the judges keep their hands pretty much off questions of tariff valuations and so on.

What I have just said about revocation cases is very relevant to exclusion cases if full administrative hearings are granted there. It would be simpler for the courts to determine obscenity in the same way whether the case involves mailability or low rates. The assimilation will become even more desirable if, as already suggested,<sup>107</sup> a questionable magazine is to be given a single hearing on the double departmental de-

<sup>107</sup> See above, p. 323. The merger there suggested for Espionage Act cases could easily be extended to obscenity, if that continues to be a ground for revocation of low rates; but on that see above, p. 304.

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mands for exclusion of past issues and loss of low rates for future issues.

To sum up this whole matter, judicial review performs two services in connection with official censorship: It gives a proper opportunity to correct the censor's mistakes. It impels the censor to do a better job and thus avoid mistakes. These two reasons vary in importance according to the way in which censors are selected and the working methods which they employ. The better the censorship, the less the need for a judicial review. Still, human nature being what it is and good censors being as rare as they are, freedom of the press is more likely to exist if it is always safeguarded by the possibility of a full determination of the issues in court.

*Problem 12. Should there be a jury trial?*—Inasmuch as the jury is the traditional channel through which the people can say what they want to be able to read, I recommend that Congress should treat mailed books like imported books and give either side a jury trial if it wants one. No doubt, in most cases of resort to the courts both parties will probably be content to leave everything to the judge.

### CONCLUDING REMARKS

The preceding discussion leaves much to congressional action and still more to departmental action. It is not for me to say what precise remedies will work best. My main purpose has been to bring out three points: First, the extent and operation of postal censorship has a very important effect upon the communications of news and ideas. Second, the present operation of postal censorship is very unsatisfactory, especially in exclusion cases. Third, there are several sensible ways to improve it. I have assumed throughout that postal censorship is here to stay. The main concern is to make it work better than it does now.

*DIVISION C*  
*PROTECTION AGAINST INTERNAL DISOR-*  
*DER AND INTERFERENCES WITH THE*  
*OPERATION OF GOVERNMENT*

**T**HE "clear and present danger" test has been frequently applied in cases under this heading and seems to work better here than for obscenity and other matters under the preceding heading.<sup>1</sup>

As already stated, some laws overlap both the present heading and the next heading of "Protection against External Aggression." Both headings will be briefly treated, since this book is concerned not with the management of crises but with problems which are present in ordinary times. For this reason, the single topic of "Contempt of Court" does require fuller consideration.

<sup>1</sup> See above, pp. 54-59.



## TREASON AND SEDITION IN PEACE

TREASON<sup>1</sup>

**T**HIS crime, which will be defined when we consider treason in relation to foreign enemies, has had little practical importance in peace since Aaron Burr was acquitted.

CONSPIRACY TO OVERTHROW THE GOVERNMENT OF THE UNITED STATES OR TO CAUSE DISOBEDIENCE TO THE LAWS OF THE UNITED STATES<sup>2</sup>

The part utterances play in this crime need not detain us. The conspiracy statutes are sufficiently sweeping to enable us to deal effectively with most of the dangers which are often said to render peacetime sedition laws necessary.<sup>3</sup>

INCITING INSURRECTION<sup>4</sup>

The existence of this crime also dispenses with any real need for peacetime sedition laws. We have already seen that matter advocating treason, insurrection, etc., is nonmailable and denied importation.<sup>5</sup>

## INCITEMENT TO VIOLENCE OR OTHER CRIMES

This is punishable by statute in a number of states, and in some states it is a common-law crime.<sup>6</sup> Where the crime exists,

<sup>1</sup> 18 United States Code, secs. 1, 2. See below, chap. 16.

<sup>2</sup> 18 United States Code, secs. 6, 88. See below, chap. 16.

<sup>3</sup> See FSUS, pp. 146-48, 455-57.

<sup>4</sup> Above, pp. 245-47, 250, 289.

<sup>5</sup> 18 United States Code, sec. 4.

<sup>6</sup> See FSUS, pp. 152, 575-76.

## TREASON AND SEDITION IN PEACE

sedition legislation is somewhat overlapping. Threats to kill the President are a federal crime.<sup>7</sup> To some extent incitements to crime are nonmailable.<sup>8</sup>

### PEACETIME SEDITION

The law of seditious libel was frequently invoked in England and the American colonies during the eighteenth century against periodicals for what would now be considered mild anti-administration editorials. Famous cases were those of Zenger in New York for adversely criticizing the royal governor and of Wilkes and the Junius letters in England.<sup>9</sup> Prosecutions for sedition were greatly detested by the men who brought about our Revolution. In spite of this, the crime has been revived by American legislation during three periods of our history because of the fears associated with a time of serious strains and dissensions.

### AMERICAN SEDITION LEGISLATION

1. *The Sedition Act of 1798* resulted from the clashes of American opinion which followed the French Revolution. While a naval war with France was impending, which was strongly opposed by the Republicans (as Jefferson's party was called), the Administration of John Adams obtained from Congress not only an act authorizing the arrest and expulsion of aliens but also a criminal statute to curb antagonistic citizens. This law had some unobjectionable clauses about conspiracy to impede the operation of federal laws, like the present conspiracy statutes already described. Then it went on to make punishable "any false, scandalous and malicious writing"

<sup>7</sup> 18 United States Code, sec. 89. See FSUS, pp. 183-84, for absurd interpretations of this law.

<sup>8</sup> Above, p. 290.

<sup>9</sup> See the chapter on the history of the law of sedition in FSUS, pp. 497-516.

## TREASON AND SEDITION IN PEACE

against the government or either House of Congress or the President, "with intent to defame [them] . . . , or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States, or to stir up sedition."<sup>10</sup> The maximum penalty was a fine of \$2,000 and two years' imprisonment.

The press was much more the object of this law than has been true of sedition proceedings in our time. The four leading Republican newspapers of the country were the *Aurora* (Philadelphia), the *Examiner* (Richmond), the *Argus* (New York), and the *Independent Chronicle* (Boston). These were located at strategic points, edited with considerable ability, and possessed of a relatively large circulation. The other Republican papers consisted mostly of articles reprinted from these four. All four were attacked through their proprietors, editors, or chief writers, especially Benjamin Bache's *Aurora* because it was the ablest, boldest, and most influential. The important newspapermen escaped convictions by dying or delaying, but at least two editors of smaller Republican papers went to prison, and there were energetic efforts to suppress such journals in many states.<sup>11</sup>

The 1798 statute had one good provision. It expired by its own terms after two years. Unfortunately, this device has not been copied in later sedition legislation. Many legislators who are too timid to support the repeal of a law which has worked badly are too sensible to vote for its re-enactment.

During the short life of the Act of 1798, although the punishments imposed were mild in comparison with the sentences of our enlightened age, they raised an angry storm which cul-

<sup>10</sup> 1 Statutes at Large 596 (1798).

<sup>11</sup> F. M. Anderson, "The Enforcement of the Alien and Sedition Laws," in *Annual Report of the American Historical Association* (1912), p. 115 at 120-21.

## TREASON AND SEDITION IN PEACE

minated in the disappearance of the Federalist party. Jefferson became President and pardoned all the prisoners. Congress eventually repaid their fines with substantial interest. For a hundred and forty years this disastrous experience deterred the passage of another federal peacetime sedition law. American citizens maintained the courage which Jefferson voiced in his First Inaugural:

"If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it. I know indeed that some honest men have feared that a republican government cannot be strong; that this government is not strong enough. But would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm on the theoretic and visionary fear that this government, the world's best hope, may, by possibility, want energy to preserve itself? I trust not. I believe this, on the contrary, the strongest government on earth."

2. *State statutes, 1901-20.*—Our confident toleration of the expression of heterodox ideas during the whole of the nineteenth century was checked in the opening year of the twentieth by the assassination of President McKinley. Congress directed its action to aliens, and for the first time it made the possession or statement of political opinions a ground for exclusion or deportation. The ensuing increasingly drastic legislation against foreigners in our midst is significant of a growing inhospitality toward fresh thoughts from abroad, but it has apparently had little effect on the American press except perhaps to dampen the ardor of some alien editors of foreign-language newspapers and other minority organs. Radical citizens, however, were unmolested by the federal law. Their turn

## TREASON AND SEDITION IN PEACE

came when state authorities responded to local crises by recognizing novel kinds of sedition.

The state of New York, where McKinley was shot, started the movement in 1902 by creating the offense of criminal anarchy, which was defined as "the doctrine that organized government should be overthrown by force or violence, or by assassination . . . , or by any unlawful means."<sup>12</sup> The press is affected by a provision that the editor or proprietor of a periodical or the publisher of a book which contains the proscribed matter is punishable unless it was printed without his knowledge or authority and disavowed immediately. This statute lay idle for over fifteen years until the unrest inspired by the Russian Revolution.

At first the only other state to follow suit was New Jersey, which passed its own Anti-anarchy Act at once, and in 1908 was prompted by the appearance of left-wing elements in labor to enact a more specific law punishing persons who advocate, encourage, justify, praise, or incite the unlawful burning or destruction of public or private property.<sup>13</sup> This last statute was successfully invoked against leaders of a strike in the Paterson silk mills, but the attempt broke down to impose the much severer penalties of the Anti-anarchy Act for an editorial in a labor paper denouncing police action in the same strike.<sup>14</sup> Washington went further in 1909 by making it a crime to sell or distribute any written or printed matter in any form advocating or having a tendency to encourage the commission of any crime or breach of the peace or tending to encourage disrespect for law.<sup>15</sup> Under this, the editor of a small

<sup>12</sup> This is now New York Penal Law, secs. 160-66.

<sup>13</sup> This is now 2 New Jersey Statutes Annotated (1939), secs. 173-10, -11.

<sup>14</sup> *State v. Scott*, 86 New Jersey Law Reports 133 (1914).

<sup>15</sup> This is now 4 Remington's Revised Washington Statutes Annotated (1932), sec. 2564.

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journal called the *Agitator* was convicted for an article, "The Nude and the Prudes," declaring bathing suits superfluous.<sup>16</sup>

When the first World War produced a host of far-ranging prosecutions under the Espionage Act, several states enacted wartime sedition statutes. The pace was set, and peacetime sedition legislation easily followed all over the country when the Russian Revolution was giving rise to various types of left-wing agitation and the older Industrial Workers of the World (IWW) were springing into renewed activity.<sup>17</sup> The statutory language is not uniform, but eighteen states and two territories combined the New York Anti-anarchy Act and the New Jersey incitement statute of 1908 to establish the new offense of Criminal Syndicalism, defined as the "doctrine . . . advocating, teaching or aiding and abetting the commission of crime, sabotage . . . , or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."<sup>18</sup> Although these statutes soon became a dead letter in most states, they were enforced for years in California and Oregon with great vigor.<sup>19</sup> And New York, under the guidance of the Lusk Committee, employed its 1902 statute, which was drawn against anarchists, so as to prosecute left-wing Socialists at the opposite pole of political

<sup>16</sup> *State v. Fox*, 71 Washington Reports 185 (1912), affirmed in 236 United States Reports 273 (1915), opinion by Holmes.

<sup>17</sup> The numerous state statutes are collected by states in FSUS, pp. 575-97.

<sup>18</sup> Quoted from California General Laws (Deering, 1937), Act 8428, passed in 1919. Similar statutes exist in Alaska, Arizona, Hawaii, Idaho, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, and Washington. As to Oregon, see below, n. 22.

<sup>19</sup> See FSUS, pp. 326-54, 384-88.

thought.<sup>20</sup> Although manifestos and radical magazines were sometimes involved in the numerous state cases, they were usually directed against speakers and organizers, not against the press. Eventually the Supreme Court upset some convictions under these statutes on the ground that liberty of speech was impaired without any clear and present danger of violence or revolution,<sup>21</sup> and prosecutions became much less frequent. In Oregon a particularly harsh conviction produced such a revulsion that the entire Criminal Syndicalism Act was repealed in 1937 and replaced by a statute like the federal Conspiracy Act which imposes a much shorter term of imprisonment for conspiracy to commit a felony.<sup>22</sup> *Other states with this or other drastic sedition statutes would do well to consider the desirability of following the example set by Oregon.*

3. *The Alien Registration Act of 1940.*—In 1919 and 1920 the contagious effect of the state statutes just described and the "Red menace" brought a mass of federal peacetime sedition bills before Congress.<sup>23</sup> They were opposed by many editors and owners of newspapers, by the American Federation of Labor through the personal appearance of Samuel Gompers, and by many other influential organizations. Congress adjourned without enacting a law. During the next twenty years, many of them marked by the worst depression in our history, the nation suffered no internal disturbances which

<sup>20</sup> *Gillow v. New York*, 268 United States Reports 652 (1925), and other cases discussed in FSUS, pp. 218-25.

<sup>21</sup> *Fiske v. Kansas*, 274 United States Reports 380 (1927); *DeJonge v. Oregon*, 299 United States Reports 353 (1937); *Herndon v. Lowry*, 301 United States Reports 242 (1937) (under old Georgia statute against inciting slave insurrections); see also *Stromberg v. California*, 233 United States Reports 359 (1931) (red-flag law). These decisions are discussed in FSUS, pp. 351-52, 363-66, 384-86.

<sup>22</sup> FSUS, pp. 478-80.

<sup>23</sup> These bills are described in FSUS, pp. 168-69.

## TREASON AND SEDITION IN PEACE

could not be easily quieted by the use of ordinary criminal statutes. Yet in 1940 Congress did what it had refused to do at the height of the excitement over bolshevism and enacted the first federal peacetime sedition law since 1798. The opposition at the hearings had none of the impressiveness of that in 1919-20, although the new law is in some respects more sweeping than the rejected bills of that time. In particular, it contains a provision for the search of houses for books violating the statute, which might lead to serious interference with freedom to read.<sup>24</sup> The speed with which this drastic legislation was adopted is attributable to at least four causes: Hitler's conquest of the Low Countries and France, which had just taken place, and fears of the "Fifth Column"; the growing hostility in Congress toward all aliens, against whom other sections of the Act were aimed; the increasing control of the Army and Navy over civilian life; and a slackening of that courageous confidence in our own institutions which Jefferson had expressed in the First Inaugural.<sup>25</sup>

The main crimes in the 1940 Act are of two sorts. First, section 1 extends to times of peace the second clause of the Espionage Act of 1917 (hereafter quoted),<sup>26</sup> which applies only during war. The new law punishes any person who, "with intent to interfere with, impair, or influence [their] loyalty, morale or discipline," shall "advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces," or distribute any written or printed matter with this effect. These forces include the Army and Navy, the Marine Corps,

<sup>24</sup> 18 United States Code (1944 Supplement), sec. 12. See FSUS, pp. 485-89; above, p. 67.

<sup>25</sup> See above, 371; FSUS, pp. 442-46.

<sup>26</sup> See below, p. 448, clause (2) of the statute there quoted.



## TREASON AND SEDITION IN PEACE

Coast Guard, Naval Reserve, and seamen on merchant vessels in the service of the Army and the Navy.<sup>27</sup>

This language seems on its face to reach only bad persons who have actually sought to stir up disaffection among men in service. Yet, if it is construed in the way courts construed the corresponding words of the Espionage Act during World War I,<sup>28</sup> the new law might be used against books and articles in periodicals which oppose conscription in peace or criticize the conduct of officers toward their subordinates and other conditions in the armed forces, inasmuch as such writing is calculated to demoralize some soldiers and sailors. As I have shown elsewhere,<sup>29</sup> the conspiracy statutes and abundant other federal legislation enable the government to deal directly with those who are deliberately interfering with military and naval discipline. For example, the Selective Service Act of 1940 punishes anybody who counsels another to evade registration or service.<sup>30</sup> Consequently, there is no need to run the risks inherent in this part of the Alien Registration Act.

Fortunately, in 1944 the Espionage Act was carefully limited by the Supreme Court in the *Hartzel* case<sup>31</sup> so that the corresponding peacetime clauses in the Alien Registration Act are much less likely to be given the loose interpretation which they received during World War I. The danger that section 1 will curb civilians who discuss military and naval affairs is somewhat reduced, but its provisions still remain superfluous and capable of serving as a threat to those whose opinions are objectionable to Army and Navy chiefs or to the Department of Justice.

<sup>27</sup> This is now 18 United States Code (1944 Supplement), sec. 9.

<sup>28</sup> Below, pp. 448-49.

<sup>29</sup> 50 United States Code Appendix, sec. 311.

<sup>30</sup> FSUS, pp. 455-58.

<sup>31</sup> See below, pp. 450-51.

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Such possibilities are indicated by the *Dunne* case (discussed shortly) and by the blanket prosecution which brought thirty defendants from all over the country to Washington for trial for conspiring to violate this statute. The voluminous printed matter which was alleged in the indictment to advise insubordination and disloyalty in the armed forces included Hitler's *Mein Kampf*, a pamphlet entitled *Roosevelt's Jewish Ancestry*, and *The Dynamics of War and Revolution* by Lawrence Dennis, a defendant, which was published by Harper and Brothers. The statements in this material which the indictment charged the defendants with disseminating in pursuance of their conspiracy to stir up mutiny comprised stuff of this sort: "A national socialist revolution is inevitable if we are to rid our country of its decadent democracy." "The Government of the United States, the Congress and public officials are controlled by communists, International Jews and Plutocrats." "The nations opposed to the Axis, plan to use American lives, money and property to defend their decadent systems of government." Distasteful as these ideas are to most of us, they do constitute political and economic discussion, and their relationship to insubordination in the armed forces is very remote. There was not even an allegation that any member of the Army or Navy ever received any of the printed material set forth or was influenced by it. Nevertheless, the indictment was held to state a crime under the Act.<sup>32</sup> The trial ran with many absurd incidents from April, 1944, until the end of November, when the judge died before the government had put in all its evidence.

<sup>32</sup> *United States v. McWilliams*, 54 Federal Supplement 791 (Dist. Col. 1944). For an account of the case by a defense lawyer and a defendant, see St. George and Dennis, *A Trial on Trial* (1946). This reprints the indictment (pp. 114-21). See also *Pelley v. Botkin*, 152 Federal Reporter, 2d Series, 12 (Dist. Col. Appeals, 1945).

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Section 2<sup>33</sup> of the Alien Registration Act of 1940 has a scheme like the New York Anti-anarchy Act and the Criminal Syndicalism Act of numerous states. This makes it unlawful for any person

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

This is much more plainly a sedition law than the section already discussed. Though a law without precedent since 1798, it reached the floor of the Congress without ever being submitted to the test of a public hearing. No proof was offered of any evil which had to be remedied by these provisions, or that the conspiracy statutes had proved inadequate. The chief argument urged for section 2 was that citizens should be unable to say what would make an alien deportable.<sup>34</sup>

The maximum imprisonment for violating either this or the preceding section is ten years. The Sedition Act of 1798 imposed two years. The conspiracy statutes impose a maximum of six years. Thus conspiring the actual overthrow of the gov-

<sup>33</sup> This is now 18 United States Code (1944 Supplement), sec. 10.

<sup>34</sup> For the history of this section see FSUS, pp. 463-66.

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ernment by force is considered only about half as bad as merely advocating its overthrow.

The only reported case under section 2, *Dunne v. United States*,<sup>36</sup> brings out the vague scope of the law. The defendants were officers or active members of a Trotskyite organization in Minnesota, the Socialist Workers party. A magazine, the *Militant*, and other official publications proposed direct mass actions and avoidance of limitation to parliamentary activities, defense of concrete working-class rights, and the fostering of "Defense Guards" within labor unions to use force for union protection. These Guards were to grow into a militia and finally into the Red Army. The first and apparently the only step toward realization of this program was the formation of a Defense Guard in a teamsters' local at Minneapolis, an independent union which was naturally unwelcome to the powerful teamsters' union affiliated with the AF of L, whose head, Mr. Daniel Tobin, was a valued supporter of the Roosevelt Administration. After the defendants had conducted a Minneapolis strike with considerable violence, they were prosecuted, not for assault and battery, but for conspiring to advocate the overthrow of the government of the United States by force. The convictions of eighteen men were affirmed on appeal.

During the conferences of our Commission, one member remarked: "You never have a clear-cut case of sedition. It is always bound up with other things. The Nazi movement is also an anti-Semitic movement; the Communist movement is also an anti-Catholic movement. The pressures to suppress are not really based on sedition, although that may be used as

<sup>36</sup> 138 Federal Reporter, 2d Series, 137 (C.C.A. 8th, 1943). The Supreme Court refused to review the case, 320 United States Reports 790, 814, 815 (1943). This also involved sec. 1.

## TREASON AND SEDITION IN PEACE

a reason. They are based upon the feeling that an imperiled group has to defend itself against the other things." In the same way, when low-paid migratory laborers in California organized themselves into the IWW, nobody really thought that they were going to accomplish "a change in industrial ownership or any political change," in the words of the Criminal Syndicalism Act, but they might make it more expensive to get in the prune crop. When the state of Georgia prosecuted a Negro Communist for "attempt to incite insurrection,"<sup>36</sup> the white authorities did not expect that he would set up the Black Belt Free State across the Solid South which his booklets proposed, but there was a clear and present danger that he might persuade many colored citizens to demand the vote which is guaranteed them by the Fifteenth Amendment. The *Dunne* case is still another illustration of the use of sedition laws to stop something other than sedition. The prospect that this handful of Trotskyites would endanger the United States government was nil, but it was very convenient for the citizens of Minneapolis and the AF of L teamsters to get these troublemakers behind prison bars.

Dislike of the Alien Registration Act is not confined to the editors of heterodox journals. One of our experienced newspaper informants regarded this statute as a potential threat to freedom of the press. The crime of advocating the overthrowing of the government makes it easy, he thought, to haul a newspaper into court for constructive criticism.

### DESIRABILITY OF THE REPEAL OF EXISTING FEDERAL AND STATE SEDITION STATUTES

*The Commission in its general report has recommended the repeal of legislation prohibiting expressions in favor of revolutionary changes in our institutions where there is no clear and*

<sup>36</sup> *Herndon v. Lowry*, above, n. 21.

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*present danger that violence will result from the expressions.* The reasons for this action are given as follows:

"The Supreme Court has held that expressions urging the overthrow of the government by force are within the protection of the First Amendment unless there is a clear and present danger that these expressions will lead to violence. We believe that this sound principle is violated by the peacetime sedition clauses of the Alien Registration Act of 1940 and by the various state syndicalism acts which make it a crime to advocate the overthrow of the government by force, irrespective of the probable effect of the statements. The really dangerous persons within the scope of these laws can be reached by the conspiracy statutes and the general criminal law. As applied to other persons, which is most likely to be the case, these laws are of dubious constitutionality and unwise. Yet only a few of the agitators who are prosecuted can succeed in getting before the Supreme Court. Consequently, so long as this legislation remains on the statute-books, its intimidating effect is capable of stifling political and economic discussion. These acts ought to be repealed."<sup>37</sup>

If the federal conspiracy statutes already described<sup>38</sup> are considered an insufficient protection, then they should be supplemented by state legislation punishing direct incitement of felonies. The object is to take care of speech and writing which is really close to criminal action.

It may be urged that one exception should be made to the principle of letting mere talk go on—that liberty of the press should be denied to those who propose to abolish it when they get into power. The enemies of freedom, the argument runs, are not entitled to freedom. We should not tolerate the revolu-

<sup>37</sup> *A Free and Responsible Press*, p. 88.

<sup>38</sup> Above, p. 368.

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tionary critic of democracy. He should not profit by the very system he seeks to destroy. A person who does not want a free society cannot claim the benefits of a free society. He cannot have it both ways.

My reply is twofold. First, the trouble is that you cannot frame any law which would pick out such a man for punishment without at the same time hitting many other people whom it would be wise to let talk. Until you study the actual working of sedition statutes, you can have no conception of the way they are used to reach men who are entirely different from what honest supporters of the legislation had in mind when it was passed. Second, even if a particular writer or publisher does not deserve freedom of the press, that freedom exists for the good of his readers as well as for him. Revolutionary propaganda may accompany helpful criticisms of existing political or economic processes which we cannot afford to lose. Furthermore, statements which are utterly worthless in themselves may reveal that a substantial number of citizens are nursing a bitter grievance. Then, although this grievance is unjustified, the leaders of the community on becoming aware of its existence can do their very best to explain it away convincingly so as to turn some of the men who were mistakenly discontented into loyal participants in our democratic way of life.

Undoubtedly, a country may face a situation when it has no time for the examination of reforms and the efforts toward conciliation of the disaffected which I have just described. There can be crises in which a society will suppress its foes within rather than go down nobly. The preservation of freedom of the press requires the existence of a considerable margin of security. But we in the United States have a tremendous margin of security.

## **TREASON AND SEDITION IN PEACE**

We need not be frightened by the fate of countries like France in 1940 where toleration did fail. There were many reasons for their downfall besides liberty of the press. For example, the most important political offices were filled with persons determined to destroy the existing government. When that happens, the severest type of laws controlling the press will do no good. Nothing short of a national house-cleaning can save such a state from its doom.

The situation is absolutely different for a strong government like the government of the United States. Our best protection against internal enemies of freedom lies in the free flow of discussion, in the absence of spies and eavesdroppers on conversations and seizers of private correspondence (who are the inevitable instruments of a regime of suppression), and in the adoption of well-considered improvements of political and economic institutions. Safety against disloyalty will come from producing the conditions which evoke loyalty in an increasingly large number of citizens.



CONTEMPT OF COURT<sup>1</sup>

**A**S AN incident to their being, "courts must have the authority 'necessary in a strict sense' to enable them to go on with their work. In doing their work, courts, like others, may encounter obstructions. They must, therefore, be invested with incidental powers of self-protection. A clamor in a court room may interrupt proceedings; a contumacious witness may halt a trial. . . . Some action is necessary to enable the court to proceed with its affairs. Courts, then, must have adequate authority to deal with such events."<sup>2</sup>

The administration of justice can easily be warped by improper publications in the press. For example, if a newspaper during a trial prints verbatim evidence which the judge has ordered kept away from the jury, then the unsuitable matter may reach the jury when they read the newspaper or talk with those who did read it. Even when the jurymen are locked up at night and denied newspapers, as happens during murder trials, it is difficult to protect them from the effect of an electric atmosphere in the courtroom which results from biased accounts of the trial in the press.

<sup>1</sup> The discussion of this matter excludes contempt for violations of injunctions and orders to sign a deed and other judicial decrees given for the benefit of parties to litigation. The press is rarely charged with contempt for such reasons. We are concerned only with acts by a newspaper (or other instrumentality of communication) which conceivably interfere with the proper administration of justice in controversies to which it is not a party.

<sup>2</sup> Frankfurter and Landis, "Power of Congress over Procedure in Criminal Contempts . . .," 37 *Harvard Law Review* 1010, 1022 (1924).

An example of this subtle influence is supplied by a famous murder case in San Francisco in 1895. Blanche Lamont, a girl of twenty-one, had disappeared, and ten days later her naked body was found in the belfry tower of a church where she had played the violin in an amateur orchestra. William Durrant, the librarian of the church, was charged with killing her. No probable motive for the murder was ever found.<sup>3</sup> There was great excitement in the city before and during the trial. While it was in progress, a local theater produced a play called *The Crime of a Century*, based on the facts of the case and representing Durrant as the murderer.<sup>4</sup> The newspaper situation was thus described by Judge Henshaw, in considering Durrant's appeal after conviction:

The murder of Blanche Lamont was a crime of so atrocious a character that the community was greatly aroused. Its ghastly and sensational features were seized upon with avidity by the newspapers, and daily paraded and exploited before their horrified readers. When Durrant was arrested for the crime there was no reservation of judgment upon their part, but they proceeded with unanimity to hold him up to the public as the guilty man. During the trial of the case they vied with each other in sensational discoveries and prophecies concerning new evidence and strange witnesses. They maintained throughout the attitude which they originally assumed, and from first to last continued to treat defendant as the undoubted criminal.<sup>5</sup>

Other agencies of communication besides newspapers may be liable for contempt. The producer of the play about

<sup>3</sup> For a full account of the Durrant trial see Wigmore, *Principles of Judicial Proof* (2d ed., 1931), p. 691.

<sup>4</sup> The trial court enjoined the production of this play and sentenced the producer for contempt in disregarding the order; but the injunction was later annulled as an interference with "the right of free speech." This decision is very questionable (*Dailey v. Superior Court*, 112 California Reports 94 (1896)). The court said that the manager could have been punished for contempt after producing the play, even though not enjoined in advance.

<sup>5</sup> *People v. Durrant*, 116 California Reports 179 at 223 (1897). However, the conviction was affirmed.

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Blanche Lamont could have been punished afterward. When the minister of a Los Angeles church, who operated a radio station, supported prosecutions for political corruption by attacking the judges, in his evening broadcasts, for rulings made during the day's trials, the minister was imprisoned and fined for contempt, and his station license was not renewed.<sup>6</sup>

When newspapers and broadcasters are not allowed to tell all they know or think about a case, the law is plainly depriving the public of some of the truth. Yet something of the sort is necessary because the community desires the issues between the parties to be tried in the courtroom rather than in the press. Once more the policy in favor of liberty of the press has to be balanced against another important social policy—in this instance, the efficient administration of justice. Judges and jurymen must be enabled to base their conclusions on the evidence and arguments properly submitted to them, unswayed by outside influences.

In other words, this is not a situation where we can safely follow the traditional practice, urged by Milton and Holmes, of leaving objectionable talk to be corrected by more talk on the other side. A judge cannot answer back in the ordinary way. He has to act and speak within the special scope of his work. As Justice Frankfurter observed in a dissenting opinion:

A trial is not a "free trade in ideas," nor is the best test of truth in a courtroom "the power of the thought to get itself accepted in the competition of the market." . . . . A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expres-

<sup>6</sup> *In re Shuler*, 210 California Reports 377 (1930); *Trinity Methodist Church, South v. Federal Radio Commission*, 62 Federal Reporter, 2d Series, 880 (Dist. Col. Appeals, 1932).

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sion by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.<sup>7</sup>

The duty of a judge to act independently of all external pressures was nobly expressed by Lord Mansfield, after he had decided in favor of John Wilkes, the popular patriot whose condemnation was desired by the King and his ministers and whom Lord Mansfield detested personally and politically:

It is fit to take some notice of the various terrors hung out; the numerous crowds which have attended and now attend in and about the hall, out of all reach of hearing what passes in Court; and the tumults which, in other places, have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom, by commotions and general confusion. Give me leave to take the opportunity of this great and respectable audience, to let the whole world know all such attempts are vain. . . . The Constitution does not allow reasons of state to influence our judgments: God forbid it should! We must not regard political consequences, how formidable soever they might be: if rebellion was the certain consequence, we are bound to say, "Fiat justitia, ruat coelum." . . . We are to say what we take the law to be: if we do not speak our real opinions, we prevaricate with God and our own consciences. I pass over many anonymous letters I have received. Those in print are public; and some of them have been brought judicially before the Court. Whoever the writers are, they take the wrong way. I will do my duty, unawed. What am I to fear? That "mendax infamia" from the press, which daily coins false facts and false motives? The lies of calumny carry no terror to me. I trust that my temper of mind, and the color and conduct of my life, have given me a suit of armor against these arrows. . . . I honor the king and respect the people; but many things, acquired by the favor of either,

<sup>7</sup> *Bridges v. California*, 314 United States Report 252 at 283 (1941). This case will be discussed later.

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are in my account objects not worth ambition. I wish popularity; but it is that popularity which follows, not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends by noble means. I will not do that which my conscience tells me is wrong, upon this occasion, to gain the huzzas of thousands or the daily praise of all the papers which come from the press. I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. . . . The threats go further than abuse: personal violence is denounced. I do not believe it: it is not the genius of the worst men of this country, in the worst of time. But I have set my mind at rest. The last end that can happen to any man never comes too soon, if he falls in support of the law and liberty of his country; for liberty is synonymous to law and government.<sup>3</sup>

It is not always easy, however, to balance this policy of efficient justice against liberty of the press. The proper weight to be ascribed to each side of the scale varies with the nature of the publication, the precise state of the court proceedings, and the presence or absence of a jury. When a judge sits without a jury, newspaper articles about the case may still constitute contempt because some judges are not so firm as Lord Mansfield and because all judges can do their work best when they are not distracted by controversy. Still, human nature being what it is, a judge may readily come to identify any adverse criticism of himself with interference with the machinery of justice. When the press attacks private citizens or other public officers up to the President, their only legal remedy is to sue for libel, but when the press attacks a judge, he has at his disposal the powerful weapon of contempt. The temptation for him to wield it recklessly and too often is obvious. Should there then be limits on this judicial power in order to safeguard liberty of the press from arbitrary curbs? This question has arisen repeatedly and in many different

<sup>3</sup> John Wilkes' Case, 19 Howell's State Trials 1075 at 1111-14 (1768).

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ways. This book cannot possibly discuss all the problems of the relation of newspapers to the courts, but I shall present three of the most important, illustrating them by decisions of the United States Supreme Court.

### WHO DETERMINES GUILT FOR CONTEMPT?

If a man in a courtroom throws an egg at the judge on the bench, the judge does not turn the culprit over to the public to await a criminal prosecution but maintains order by sentencing the culprit on the spot.<sup>9</sup> Similarly, if certain testimony after being ruled inadmissible by the judge is nevertheless retailed to the jury by the witness or by the lawyer who wants it known, the judge will again protect the orderly administration of justice by himself trying and condemning the wrongdoer without delay. This is called summary punishment for contempt, and it plainly differs from the ordinary criminal proceeding.

Suppose, now, that the testimony which has been excluded by the trial judge in the morning is communicated to the jurymen in the evening paper which they read on their way home from the courthouse. Inasmuch as the trial is far from ended, the effect of telling the jurymen improper evidence is practically the same whether this is done orally in the courtroom or by print outside. Hence it is natural for the judge to impose summary punishment on the editor or publisher of the newspaper. And the judge is likely to follow the same course when the publication to which he objects consists, not of inadmissible evidence, but of vituperative attacks on his conduct of the trial. Bent on the swift and fair dispatch of his judicial business, he is inclined to think it necessary to stop at

<sup>9</sup> *Re Cosgrace* (1877), narrated by Fox, "The Practice in Contempt of Court Cases," 38 *Law Quarterly Review* at 185 (1922), reprinted in Chafee and Simpson, *Cases on Equity* (1st ed., 1934), I, 54.

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once anything which he considers an interference with his work, regardless of the place where the action occurred.

Still, there are grave possibilities of abuse when a man sits as judge in his own cause, determines whether he himself has been wronged, and then imposes as severe a penalty as he pleases. Hence a considerable popular demand arises for some limit on the power of summary punishment for contempt. Where shall the line be drawn? A solution which has been several times attempted is to draw it geographically in a circle around the courthouse. The theory underlying this solution recognizes that risks of judicial tyranny have to be run when the act happens in the courtroom, because justice might become a mockery if the law did not permit the judge to keep a firm control over what goes on in his own court. Somebody has to keep order and regulate the intricacies of the trial. On the other hand, this theory assumes that the need for stringent discipline and sudden punishment becomes notably less when the act occurs elsewhere, e.g., on the front page of a newspaper. Then the conduct of the trial is not visibly or audibly disturbed, whatever the indirect influence. Therefore, the danger of arbitrary judicial impairment of freedom is thought to outweigh the danger that the efficient administration of justice will be crippled by the delays and possible miscarriages caused by leaving the outside offender to the normal processes of the criminal law, including a jury trial of the alleged contempt.

This theory limiting summary punishment to physical nearness is obviously favorable to a newspaper, since its questionable comments on a case are usually remote from the courtroom. It will not necessarily escape punishment, for it may be condemned by a jury. Still, a jury may be so confused by the complexities of the original case that it will not com-

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prehend the injurious effect of the newspaper article; and jurymen will naturally be less solicitous than the judge himself about protecting him from outside pressures. Consequently, it may be surmised that in many past cases where summary punishment was imposed by judges, a jury would have acquitted the newspaper.

Congress in 1831 limited the power of United States judges to punish summarily by a statute, which has been slightly amended to read as follows:

The said courts shall have power . . . to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases *except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice.* . . .<sup>10</sup>

When other types of contempt are charged, the defendant may demand a jury trial.<sup>11</sup> Many state legislatures have enacted similar provisions.<sup>12</sup>

Most state courts—and the bulk of newspaper contempt cases concern state trial judges—have long refused to treat this legislation as drawing a geographical line, or indeed any effective limit on the judicial power of summary punishment. They have construed “so near thereto” in a causal sense as meaning “in close relationship thereto,” and then allowed closeness to include almost any tendency to obstruct the administration of justice. The Act of Congress was interpreted in the same way by the Supreme Court, until it swung to the

<sup>10</sup> 28 United States Code, sec. 385. (My italics.) Further exceptions about misbehavior outside by officers of the court (which includes lawyers), and disobedience to writs, etc., are not relevant to publications in the press.

<sup>11</sup> 28 *ibid.*, sec. 386; 18 *ibid.*, sec. 241.

<sup>12</sup> The state statutes and cases on their interpretation are collected in Nelles and King, 28 *Columbia Law Review* at 554-62 (1928).



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opposite extreme in 1941.<sup>13</sup> This older attitude is shown in two well-known decisions about the press.

In 1913 and 1914 Toledo was in the throes of agitation over the expiration of its street railway franchises and a city ordinance providing for three-cent fares thereafter. In January, 1914, a federal suit was brought before Judge Killits to attack the three-cent fare as unconstitutional. Before Judge Killits enjoined the enforcement of the ordinance, the *Toledo News-Bee* began publications adverse to the rights asserted against the city by the trolley company, and in no uncertain terms asserted the validity of the ordinance and challenged the court's right to upset it. This daily newspaper printed statements of a widespread public intent to board the cars and refuse to pay more than three cents even if the judge condemned the ordinance, favored this riders' strike, and mentioned the city officials who intended to back it up. The *News-Bee* gave some premature but ultimately correct intimations of what the judge was going to do, made one mistaken statement of a ruling which it criticized indirectly, hinted that the judge did not have the last word, and threw out innuendoes not flattering to his personality. Later it reported a labor union meeting where the speaker had described Judge Killits as showing from the first that he was favorable to the railroad and winding up with "Impeach Killits."

Shortly after this last incident, the judge granted an injunction against the three-cent fares. Then he summarily tried and fined the labor speaker and the *News-Bee* for contempt. The

<sup>13</sup> The late Walter Nelles and Mrs. Carol Weiss King have given a balanced and informative discussion of all this legislation with a summary of the law in each American jurisdiction in "Contempt by Publication in the United States," 28 *Columbia Law Review* 401 and 525 (1928). For clashing views on the history and proper construction of the federal statute, see Frankfurter and Landis, *op. cit.*; Berger, "Constructive Contempt: A Post-mortem," 9 *University of Chicago Law Review* 602 (1942).

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offenses condemned included newspaper articles running back for at least six months before his decision on the ordinance.

The Supreme Court affirmed his finding that the articles "manifestly tended to interfere with and obstruct the court in the discharge of its duty in a matter pending before it."<sup>14</sup> The majority held the Act of 1831 no bar to the judge's summary action. The only physical nearness to the court was that the judge was a daily reader of the *News-Bee*. From all accounts, Judge Killits was a man whom no newspaper could intimidate. However, as Chief Justice White construed the statute:

The test . . . is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty. . . .

To the argument that the publications related to a matter of public concern and were protected from contempt proceedings by the freedom of the press he replied:

The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions.

Justice Holmes dissented, with the concurrence of Justice Brandeis. He said:

When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which, if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case "to insure order and decorum in their presence." . . . And when the words of the statute are read it seems to me that the limit is too plain to be construed away. To my mind they point and point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity—not to moving to vindicate its independence after enduring the newspaper's attacks for nearly six months. . . . Misbehavior means something more than adverse comment or disrespect.

<sup>14</sup> *Toledo Newspaper Co. v. United States*, 247 United States Reports 402 (1918).

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But suppose that an imminent possibility of obstruction is sufficient. Still I think that only immediate and necessary action is contemplated. . . . I will assume . . . that he read [the newspaper statements] as they came out. . . . But a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty. . . . I confess that I cannot find . . . in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words.

. . . Judge Killitts . . . said ". . . that the court endured the *News-Bee's* attacks upon suitors before it and upon the court itself, and carried all the embarrassment inevitable from these publications, for nearly six months before moving to vindicate its independence." It appears to me that this statement is enough to show that there was no emergency, that there was nothing that warranted a finding that the administration of justice was obstructed, or a resort to this summary proceeding. . . . I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts.

The next case illustrates the extent to which the doctrine of the *News-Bee* decision could encourage a federal trial judge to stretch the Act of 1831. In October, 1919, Craig, the comptroller of New York City, wrote and published in various metropolitan newspapers a letter to Nixon, a state public service commissioner, during the federal receivership of the Brooklyn Rapid Transit Company and other street railways. The court receiver, as often happens without impropriety, was acceptable to the companies and the bondholders. The city had asked for Craig's appointment as co-receiver, but Judge Mayer denied the motion with leave to reopen the matter later. Then Nixon had invited Craig to a conference about the transportation situation in the city. Craig replied in part:

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"Before any such conference can be seriously considered, and as an evidence of good faith on the part of those acting by and under the authority of . . . Judge Mayer, there must be a reversal of the policy, for which Judge Mayer is responsible, of denying to myself and other members of the board of estimate and appointment any access to original sources of information concerning the property and affairs of these various public utility corporations holding franchises to operate in the streets of New York. . . .

"It seems to me a monstrous thing that an order of a federal judge . . . should stand between the public and the truth. . . . Such an order is hostile to every interest of the city . . . in these controversies. Its operation and effect is to disarm the municipal authorities, . . . and to force them into a contest with corporate powers entrenched in darkness and concealment. . . . As a first and preliminary evidence of good faith, those who desire such a conference and a reasonable solution of existing complications should procure the entry of orders by Judge Mayer putting the city of New York on an equal footing with the private interests active in the receiverships. A refusal to do this can but prolong and embitter the controversy, and it will not in the end procure any advantage whatever to the traction interests."

Craig was charged with contempt. Fifteen months later, after he had refused to retract, Judge Mayer sentenced the comptroller of New York City to spend sixty days in jail in Newark, New Jersey. Craig persuaded Judge Manton to discharge him on habeas corpus, but a majority of the Supreme Court, without saying whether Judge Mayer was right, held that Judge Manton was wrong. So Craig had to avoid going to jail by a pardon from President Coolidge.

Justices Holmes and Brandeis again dissented, and so did

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Judge Learned Hand in the Circuit Court of Appeals. The case really turns on technical questions which do not interest us, but it has considerable bearing on our subsequent problem of criticism of past judicial decisions; and the comment of Justice Holmes on the surprising elasticity of the Act of 1831, as then construed, deserves quotation:

That . . . makes a man judge in matters in which he is likely to have keen personal interest and feeling although neither self-protection nor the duty of going on with the work requires him to take such a part. It seems to me that the statute on its face plainly limits the jurisdiction of the judge in this class of cases to those where his personal action is necessary in a strict sense in order to enable him to go on with his work.<sup>15</sup>

In 1941 the *Toledo News-Bee* case was expressly overruled by the *Nye* case,<sup>16</sup> and the majority of the Court established the doctrine that the words "so near thereto" in the Act of Congress are now to be construed as "geographical terms." The press was not involved. Manufacturers of a patent medicine had been sued for causing the death of the plaintiff's son as a consequence of using the medicine. Two of the defendants' friends tried to get rid of this inconvenient federal suit by plying the feeble-minded father with liquor and tricking him into writing the judge that he wanted to drop his claim. Fortunately, the judge did not grant this inspired request but undertook an investigation which ended in his fining the two rascals for contempt. Because the skulduggery took place a hundred miles from the United States courthouse, the Supreme Court through Justice Douglas set aside the summary punishment as prohibited by the Act of 1831, and left them to be dealt with under the Criminal Code, "where

<sup>15</sup> *Craig v. Hecht*, 263 United States Reports 255 (1923), affirming 332 Federal Reporter 138 (C.C.A. 2d, 1922), where Learned Hand's dissent is printed.

<sup>16</sup> *Nye v. United States*, 313 United States Reports 33 (1941).

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they will be afforded the normal safeguards surrounding criminal prosecutions."

A dissenting opinion by the future Chief Justice Stone, in which Chief Justice Hughes and Justice Roberts concurred, stressed "the serious consequences to the administration of justice if courts are powerless to stop, summarily, obstructions like the present," and thought that the responsibility of departing from the long-accepted construction of the statute should be left to Congress.

Probably the *Nye* case represents the actual intent of Congress in 1831, but the question still remains whether the geographical line is wise. The old interpretation of this legislation gave trial judges too much power, which they abused in the *News-Bee* and *Craig* cases. Yet the pendulum may have swung too far in the other direction and given them less power than they need to do their work satisfactorily. Since the federal statute can always be amended if it be undesirable as now construed, and since the contempt problem largely concerns state judges, I turn aside from ticklish issues as to the interpretation of words and consider the underlying question: Does a rigid geographical limit on the power of a judge to punish contempts swiftly without a jury constitute the best solution of the conflict between the efficient administration of justice, on one side, and, on the other side, liberty of the press and the person?

There are two main reasons which make me doubtful about the wisdom of the geographical line.

First, confining the summary power to contempts in the presence of the court is a bit wooden. This solution does not really conform to the basic test of clear and present danger, which the Supreme Court has now extended to contempt cases by the *Los Angeles Times-Mirror* case, soon to be discussed.

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It is true that practically all interferences *inside* the geographical line do create such a danger and that most interferences *outside* it do not, including a large amount of newspaper comment on cases and courts. Still, there is some conduct *outside* the presence of the court which is just as dangerous as acts in the courtroom, and this is what the geographical theory fails to take into account. Imminent danger depends on the nature of *what* is done and not merely on the place *where* it is done.

In the process of saving newspaper discussion from the sort of arbitrary judicial suppression which occurred in the *News-Bee* and *Craig* cases, this theory also gives considerable leeway to types of personal misbehavior which have nothing to do with freedom of the press. As Justice Stone said while dissenting in the *Nye* case:

. . . . The surreptitious tampering with witnesses, jurors or parties . . . if it took place outside the court room or while the witness, juror or party was on his way to attend court . . . would not be punishable. . . .

The offenders who escaped in the *Nye* case were bad enough, but there are many worse possibilities of immunity from summary punishment. When Harry F. Sinclair was on trial with ex-Secretary Fall for oil frauds in 1927, he engaged the Burns Detective Agency to send fifteen operatives to shadow the twelve jurors. For days each juror was kept under strict surveillance from early morning until late at night, whenever he was not actually within the courthouse. Eventually the operators concentrated on three jurors whose history did not indicate strength of character. After a mistrial in the oil-fraud case, the trial judge sentenced Sinclair to six months in jail for contempt, which he served after losing in the Supreme Court;<sup>17</sup> but if the geographical line of the *Nye* case had then

<sup>17</sup> *Sinclair v. United States*, 279 United States Reports 749 (1929).

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been in effect, Sinclair would have had to be tried for contempt by twelve more jurymen, who might in turn have been shadowed by Burns, and so on *ad infinitum*. After the *Nye* case, it was doubtful whether Pendergast could be summarily punished for using a slush fund furnished by an agent of insurance companies to induce the Missouri Superintendent of Insurance to settle federal litigation over increases of rates in a manner satisfactory to the insurance companies.<sup>18</sup> This is the sort of interference with justice which may be relegated to jury trial along with newspaper discussion of pending cases.

The geographical theory also opens the door to matter in the press which goes far beyond unfavorable reflections on a court or a pending case. Take as examples the persistent publication in a newspaper, which the jurymen might read, of inadmissible evidence or threats, or a broadcasting station (like the Los Angeles minister's) sending out similar material every evening to the jurors in their homes. Unless this sort of thing can be stopped just as fast as a fight in the courtroom, a fair trial is well-nigh impossible. Yet under this theory it could not be summarily punished because it is done far from the courthouse, unless we are going to stretch "in the presence of the court" so far that we shall hopelessly blur the geographical line and bring ourselves right back to the causal sense of "near," which appeared in the *Toledo News-Bee* case and is now repudiated by the *Nye* case. Under modern conditions of mass communications, what is said miles away from the listeners and the courtroom can interfere with a trial much more than what is said in a low voice within sight of the judge on

<sup>18</sup> *Pendergast v. United States*, 317 United States Reports 412 at 416 (1942). See 29 Georgetown Law Journal 917. Pendergast escaped in this case because his conduct remained undiscovered until the Statute of Limitations had run, so that the Court did not decide the effect of the Act of 1831.



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the bench. Space no longer has the significance for human intercourse which it had when Congress passed the Act of 1831.

In short, we need a more rational and flexible test than the geographical line—a test which will bring within the power of summary punishment whatever publications need to be swiftly and surely stopped and leave outside it those which can be safely left to time or a jury trial. It should represent a critical balancing of the importance of efficient justice against the importance of open discussion. Somehow or other, it ought to distinguish between a newspaper editor who, in effect, thumbs his nose at the judge and one who brings to bear on the jury or the judge forces which, unless counter-acted, will warp the decision of the case—what can roughly be described in a single word as “tampering.”

It may be very hard to embody in a statute a test which takes account of present-day realities by considering the nature of the conduct as well as its physical location. Possibly the legislature will have to intrust the selection of a proper line to the more flexible operation of courts. At first sight, this appears to abandon us to judicial tyranny, but what I am now going to say will indicate that such a misfortune can be avoided.

Second, there are several other workable limitations on abuses of the summary power besides the geographical line, and these can be utilized in combination:

1. A good many kinds of publications which used to be summarily punished are no longer contempts at all. Such is the effect of the *Los Angeles Times-Mirror* case, soon to be discussed, which curbs state judges. Thus there is much less scope for abuse than formerly.

2. Steps can be taken to assure more frequent impartiality

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in the judge who summarily tries the contempt case. When the alleged offender is charged with influencing a witness or a juror in the main case, the trial judge in that case is the natural person to determine guilt for contempt. It is that judge's obligation to protect the other persons who are for the time being associated with him in the administration of justice. But when the alleged interference outside the courtroom is with the trial judge, then he is not the best man to protect himself. The principle that "No man shall be judge in his own cause" prevents him from being able to decide the controversy fairly. Just as a doctor threatened with illness calls in another doctor to take care of his case, unless this is impossible, so a judge who thinks his work endangered should intrust the matter to another judge whenever the situation warrants that course. The ripe wisdom of Chief Justice Taft, who began his career on the trial bench, needs to be taken to heart by many judges who think themselves contemned:

The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act

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in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.<sup>19</sup>

3. Mistakes by the single judge who determines guilt for contempt should be readily subjected to correction by an appellate court. Full review is not always given in state courts, but it is now the federal practice, as Chief Justice Taft pointed out in the *Craig* case in the Supreme Court:

The delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest. But the law gives the person convicted of contempt in such a case the right to have the whole question on facts and law reviewed by three judges of the Circuit Court of Appeals who have had no part in the proceedings, and if not successful in that court, to apply to this Court for an opportunity for a similar review here.<sup>20</sup>

But most appeals take time. A newspaper editor who has been unfairly condemned by the judge he criticized ought not to languish in jail for weeks while his case slowly rises to the top of the docket of the highest court of the state. This injustice can be easily remedied if appeals from these contempt sentences are given high priority and decided within a few days after the sentence. Where speed calls for summary punishment, it also calls for summary review.

4. Finally, the adoption of a changed attitude toward "trials by newspaper," as will be urged at the close of my discussion of contempt, would render judges much more reluctant to bother about making charges and so lessen the possibilities of abuse of their summary power.

<sup>19</sup> *Cooke v. United States*, 267 United States Reports 517 at 539 (1925). See also the recent observations of Judge Morris in *State ex rel. Moser v. District Court*, 116 Montana Reports 305 at 315-18 (1944).

<sup>20</sup> *Craig v. Hecht*, 263 United States Reports at 279 (1923).

## DISCUSSION OF CLEARLY PENDING CASES

### WHEN A CASE IS CLEARLY PENDING, WHAT DISCUSSION OF IT IN THE PRESS IS CONTEMPT?

In this and the next problem, the mode of determining contempt will be disregarded. They concern the line between proper discussion and contempt, no matter whether a judge or a jury tries this issue.

No question of contempt arises if a newspaper gives an understandable story of what happened in court. Suppose, however, it makes adverse criticisms as it might in recounting a debate in Congress or a presidential address. To such comments on a pending case, the judicial attitude has long been hostile. Any attacks on rulings or suggestions of what the decision ought to be ran the risk of a contempt charge. When a jury is sitting in this main case, there is considerable danger that it will accept guidance from the press rather than the court, so there is much to be said for a strict rule which postpones any discussion which might influence the jury until after their verdict is rendered. The Supreme Court has not yet passed on the validity of such a strict rule for jury trials, so I shall take it for granted and confine the ensuing discussion to the situation which has caused much greater trouble, where the case is to be decided by a court. Apart from criminal trials, this very frequently happens in an important litigation. Either the judge has to fix the sentence of a convicted offender or jury trial is waived or the suit is in equity.

How far can newspapers go in saying what judges ought to do in pending litigations? Almost any expression of opinion used to be unsafe. The *Toledo News-Bee* case exemplifies the wide definition of contempt which prevailed in federal and state courts alike until 1941. Not that all press discussions of pending cases were in fact punished. Often they were ignored by the trial judge, but if he did choose to initiate proceedings

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against a newspaper and these ended in a fine or a jail sentence, the decision was very likely to be sustained on appeal regardless of the extent of the limitation of liberty of the press. Furthermore, state cases almost always stopped at the highest state court,<sup>21</sup> because the Supreme Court had not yet displayed willingness to look into possible conflicts between contempt sentences and the "liberty" which is guaranteed by the Fourteenth Amendment against state action. However, after the Court from 1927 on began interpreting "liberty" so as to protect freedom of speech and of the press against many kinds of state suppression, it was plain that it was just a question of time when the proper scope of contempt would come before the Court.

In 1941 two cases raising this issue arrived together from California. By an amusing irony, a well-known labor agitator and a leading antilabor newspaper both asked the Court to prevent state judges from infringing their liberty to comment outspokenly on the way pending cases ought to be decided. The Supreme Court throughout handled both cases as a unit involving the same principal issues. In one case, after Judge Schmidt, a state judge, had decided that a local of longshoremen was not entitled to transfer its allegiance from an AF of L union to a CIO union and while a motion for a new trial was awaiting before Judge Schmidt, Harry Bridges telegraphed the Secretary of Labor:

"This decision is outrageous. . . . Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. . . . [The ILWU] does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the

<sup>21</sup> The only exception is *Patterson v. Colorado*, 205 United States Reports 454 (1907), affirming the state court with an interesting opinion by Justice Holmes.

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National Labor Relations Board." Bridges published this telegram in the Los Angeles and San Francisco newspapers. Although liberty of the press was thus involved, the fine for contempt was imposed on Bridges, not the newspapers. Hence I shall consider in detail only the other case, which directly involved the responsibility of a newspaper for commenting on what a judge was going to do.

In the *Times-Mirror* case,<sup>22</sup> two labor unionists, who had been convicted of assaulting nonunion truck-drivers, asked for probation. A month before the day set by the trial judge for passing on this application and pronouncing sentence (which might be to jail or to hard labor in San Quentin, the state penitentiary), the *Los Angeles Times* published an editorial entitled "Probation for Gorillas?"

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas . . . have asked for probation. . . . Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. . . .

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to [the defendants]. This community needs the example of their assignment to the jute mill."

For this the editor and the publisher were fined \$100

<sup>22</sup> *Times-Mirror Co. v. Superior Court*, 314 United States Reports 252 (1941), commonly known as *Bridges v. California*. For an interesting discussion see Radin, "Freedom of Speech and Contempt of Court," 36 Illinois Law Review 590 (1942).

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each.<sup>22</sup> After losing in the highest court of California, they went to the Supreme Court and won a five-to-four decision, along with their bitter foe, Bridges.

Justice Black delivered the opinion of the Court (supported by Justices Reed, Douglas, Murphy, and Jackson). He restated the clear-and-present-danger test as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." He refused to put publications which tend to obstruct the orderly administration of justice in a special category, to which this test of constitutional immunity from punishment would not be applicable. Comments on a pending case are as much entitled to the benefit of this clear-and-present-danger test as other utterances about governmental action and public questions. The Court should consider how much, as a practical matter, the particular contempt proceedings would affect liberty of expression.

It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.

. . . . As a practical result . . . . anyone who might wish to give public expression to his views on a pending case involving no matter

<sup>22</sup> The publisher was also fined for two editorials about other cases, which I do not describe because all the Justices agreed that they were protected by the Constitution.

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what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted.

Indeed, a judge-made threat is more serious because it is not sharply expressed like a statute in an authoritative guide to the permissible scope of comment. The editor has to write at the peril that judges will find him violating the vague standard of "reasonable tendency" to obstruct justice. And it is not enough to tell him that he can speak freely after the case is decided:

This unfocussed threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgement of freedom of expression. And to assume that each would be short is to overlook the fact that the "pendency" of a case is frequently a matter of months or even years rather than days or weeks.

What is the serious substantive evil which the contempt proceedings are to be justified as averting?

It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials.



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The Court must examine the particular utterances and the circumstances of their publication to determine to what extent the evil of unfair administration of justice was likely to result, and what was the degree of likelihood. Justice Black then quoted the "gorilla" editorial and concluded that to regard it as having substantial influence upon the course of justice "would be to impute to judges a lack of firmness, wisdom, or honor,—which we cannot accept."

Justice Frankfurter's dissent was concurred in by Chief Justice Stone and Justices Roberts and Byrnes. Without taking sides in this close case, I think this opinion more helpful to our understanding of the permanent problem of discussion of pending cases. Among many free-speech opinions, Justice Frankfurter's is unusually careful to expound *both* the conflicting interests. The theme is that in stressing freedom we must not underemphasize the need for justice, on which freedom depends.

The dependence of society upon an unswerved judiciary is such a commonplace in the history of freedom that the means by which it is maintained are too frequently taken for granted without heed to the conditions which alone make it possible. The rôle of courts of justice in our society . . . is perhaps best expressed in the Massachusetts Declaration of Rights: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

He warned that depriving the states of means for securing to their citizens justice according to law was not the right way to promote freedom of speech and of the press.

In fact, these liberties themselves depend upon an untrammelled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extra-judicial considerations. . . . And since courts are the ultimate resorts for vindicating the Bill of

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Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive mêlée of passion and pressure. The need is great that courts be criticized, but just as great that they be allowed to do their duty.

Justice Frankfurter recognized the existence of limits on the power to punish for contempt, but thought that the majority had fixed those limits too narrowly. On the permissible side of the line he placed criticism of courts and judges in general and discussion of past or future cases.

Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. . . .

That a state may, under appropriate circumstances, prevent interference with specific exercises of the process of impartial adjudication does not mean that its people lose the right to condemn decisions or the judges who render them. Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt. . . . Courts and judges must take their share of the gains and pains of discussion which is unfettered except by laws of libel, by self-restraint, and by good taste. Winds of doctrine should freely blow for the promotion of good and the correction of evil.

On the forbidden side Justice Frankfurter put publications which interfere with the impartial and calm disposition of matters under judicial consideration.

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But the Constitution does not bar a state from acting on the theory of our system of justice [to quote Justice Holmes],<sup>24</sup> that the "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." . . . .

"The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."<sup>25</sup> This has nothing to do with curtailing expression of opinion, be it political, economic, or religious, that may be offensive to orthodox views. It has to do with the power of the state to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures. . . . .

Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. . . . . A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. . . . . It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed. . . . . The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal. The power should be invoked only where the adjudicatory process may be hampered or hindered in its calm, detached, and fearless discharge of its duty on the basis of what has been submitted in court. The belief that decisions are so reached is the source of the confidence on which law ultimately rests.

The opinion then argued that the national government, through the Court, ought not to deny a state adequate power to determine whether an easygoing or a stiff view toward con-

<sup>24</sup> *Patterson v. Colorado*, 205 United States Reports at 462 (1907).

<sup>25</sup> Justice Moody, in *Chambers v. Baltimore & Ohio R.R. Co.*, 207 United States Reports at 148 (1907).

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tempts was necessary to protect judicial work in view of local conditions with which the Supreme Court was not familiar. The "gorilla" editorial could reasonably be considered "to subvert the process of deciding."

A powerful newspaper admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be "a serious mistake." . . . Here there was a real and substantial manifestation of an endeavor to exert outside influence. A powerful newspaper brought its full coercive power to bear in demanding a particular sentence. If such sentence had been imposed, readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary. We cannot say that the state court was out of bounds in concluding that such conduct offends the free course of justice.

The broad principle established by the *Bridges* and *Times-Mirror* cases was summarized five years later by Justice Reed of the Court:

*Bridges v. California* fixed reasonably well marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. The case placed orderly operation of courts as the primary and dominant requirement in the administration of justice. This essential right of the courts to be free of intimidation and coercion was held to be consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order. A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present danger rule. The evil consequence of comment must be "extremely serious and the degree of imminence extremely high before utterances can be punished." It was, of course, recognized that this formula, as would any other, inevitably had the vice of uncertainty, but it was expected that from a decent self-restraint on the part of the press and from the formula's repeated application by the

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courts standards of permissible comment would emerge which would guarantee the courts against interference and allow fair play to the good influences of open discussion.<sup>26</sup>

The lasting importance of the *Times-Mirror* decision does not lie in the actual choice here made by the Court between the desirability of free discussion and the necessity for fair adjudication, on fleeting facts where those ideals were almost evenly balanced. It lies in the exposition of those two ideals for the guidance of trial judges (state or federal) and the press. In order to get the full benefit of the presentation of each ideal, both opinions demand reading and rereading.

Before passing to the next problem, I want to consider a question which bears on both pending and nonpending cases.

What really is the harm to the work of judges that is likely to be caused by improper newspaper discussion? (It is now immaterial whether the harm is outweighed by the constitutional right to freedom, because I am trying to find out what ought to be weighed in the balance against freedom.) None of the cases already discussed quite puts a finger on the true danger. There is much talk about the intimidation and coercion of judges, and whether these consequences are probable or improbable in the particular situation. Doubtless some cases do involve the fear of undue pressure toward a given decision, but this can hardly be the actual reason for objecting to most of the publications involved in contempt cases. The chance that they will produce a decision corresponding to the wishes of the virulent editor seems to me very small. If it does ever happen that a decision is in fact coerced, the intimidated judge would be very unlikely to charge contempt. Either he is too much ashamed to drag the affair into broad daylight, or else he deceives himself into believing that this was the right

<sup>26</sup> *Pennkamp v. Florida*, 66 Supreme Court Reporter 1029 at 1031 (1946).

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way to decide the case in any event. Furthermore, judges like Killits and Mayer who have been the most stringent against newspapers are the very men least likely to be intimidated. They may say that they act to protect their weak brethren from future coercion, but I doubt whether the other judges would admit that they fell into that class. The natural tendency of intemperate articles is to make the judge decide *against* the newspaper's views. Therefore, I surmise that a great deal of this endless controversy about coercion of judges is beside the point. We must look for something else.

An easy explanation is to call judges unduly sensitive to criticism, but I am going to assume that most judges are big enough men not to put people in jail just to gratify personal vanity.

What, then, is the real harm against which judges seek to protect their work when they institute contempt proceedings against the press? Not being swerved, but being disturbed. They know that the editor will not be able to pull down one side of the scales of justice, but he can joggle them so much as to render accurate weighing almost impossible. An equity judge is often faced with a mass of conflicting evidence about hitherto unfamiliar facts, which he must make himself understand clearly so that he can present them with fulness and clarity in writing. He must appraise the arguments of opposing counsel. Each side of the controversy, considered by itself, seems clearly right, but a judge cannot throw up his hands and praise them both like a political platform. He has to decide the case. He cannot avoid making somebody lose a substantial amount of property. A criminal judge, even when aided by a jury, is obliged to fix the sentence and dispose of years of a man's life. Judge Curtis Bok's books describe the delicacy and the agony of the judicial task. A good judge is

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eager to come to such work at his best, with a calm and alert mind. That is just what may be prevented by virulent newspaper articles about the case he is struggling to consider. They throw all sorts of emotional factors into the process of decision. Human nature being what it is, the judge constantly finds himself thinking about how he might answer the foolish arguments of the editor when he ought to be thinking about the arguments of counsel. If the newspaper urges the victory of X, the judge becomes reluctant to decide for Y, since he might be acting out of resentment; and yet he is also distrustful of any inclination toward X for fear that he would be leaning over backward in order not to be unfair. If he is an elected judge, he wonders whether he is not letting himself be influenced by thoughts of re-election. Thus confused, the judge begins to lose confidence in the accuracy and honesty of his intellectual operations. In short, the newspaper keeps him from doing his work in the way he believes he ought to do it, and that is about the worst wrong anybody can commit against one who labors with his mind.

More than any other judge, Justice Frankfurter has stressed this nonintimidating type of harm from improper discussion in the press. He touched on it in his *Times-Mirror* dissent, but his concurring opinion in the very recent *Pennekamp* case<sup>27</sup> contains a much fuller analysis of "the mischief of exposing even the hardiest nature to extraneous influence":

Weak characters ought not to be judges, and the scope allowed to the press for society's sake may assume that they are not. No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know better than did our forbears how powerful is the pull of the

<sup>27</sup> 86 Supreme Court Reporter 1042-43. (My italics.) The English judges here quoted are Humphreys and Oliver in *Rex v. Davies*, [1945] 1 King's Bench Reports 435.

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unconscious and how treacherous the rational process. While the ramparts of reason have been found to be more fragile than the Age of Enlightenment had supposed, the means for arousing passion and *confusing judgment* have been reinforced. And since judges, however stalwart, are human, *the delicate task of administering justice ought not to be made unduly difficult by irresponsible print.*

Some very pertinent reflections on this problem are quoted from English judges:

I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and while I do not suggest that it is likely that any judge, as the result of information which had been improperly conveyed to him would give a decision which otherwise he would not have given, *it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty.*

. . . . Jurors are not the only people whose minds can be affected by prejudice. One of the evils of inadmissible matter being disseminated is that *no one can tell what effect a particular piece of information may have on his mind.*

And so Justice Frankfurter concludes this point:

To deny that bludgeoning or poisonous comment has power to influence, *or at least to disturb, the task of judging* is to play make-believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure.

Of course, all this does not mean that every publication about a pending case which ruffles judicial serenity is punishable as contempt. The clear-and-present-danger test applies to this kind of interference with justice as well as to attempted coercion. There must be a strong probability of serious disturbance of the process of decision.

WHAT DIFFERENCE DOES IT MAKE THAT A CASE IS NOT  
"PENDING"?

It is generally recognized that a case must be pending for discussion of it to be treated as contempt of court. The period



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of judicial control should indeed be prolonged for one purpose—to be sure that the decision of the court is not incorrectly stated in the press. Suppose that a newspaper says that a patent was invalidated when in fact it was sustained. A better remedy here than punishment is for the court to order the newspaper to retract and print promptly and prominently an accurate report of the decision in language dictated by the court, or else be heavily fined.<sup>28</sup>

An occasional state court has gone further and penalized adverse criticism of a decision, even after the case was closed. When a Georgia trial judge, after being twice reversed in the same case, wrote a long letter in a leading newspaper defending his own views of the case and accusing the appellate court of being in the habit of reversing anybody including itself and the Supreme Court of the United States, he was fined for contempt.<sup>29</sup> A convicted Virginia defendant was punished for a newspaper article abusing the court.<sup>30</sup> The great weight of authority is, however, the other way. Chief Justice Taft said in the *Craig* case:

If the publication criticises the judge or court after the matter with which the criticism has to do has been finally adjudicated and the proceedings are ended so that the carrying out of the court's judgment can not be thereby obstructed, the publication is not contempt and can not be summarily punished by the court however false, malicious or unjust it may be. The remedy of the judge as an individual is by action or prosecution for libel.<sup>31</sup>

<sup>28</sup> See *In re Providence Journal Co.*, 28 Rhode Island Reports 489 (1907); above, p. 153. On misstatements of judicial action in patent cases, see authorities collected in Pound, *Cases on Equitable Relief against Defamation* . . . (2d ed. by Chafee, 1930), p. 28 n.

<sup>29</sup> *In re Fife*, 11 Georgia Appellate Reports 665 (1912).

<sup>30</sup> *Burdett v. Commonwealth*, 103 Virginia Reports 838 (1904).

<sup>31</sup> *Craig v. Hecht*, 263 United States Reports at 278.

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In a recent Mississippi case, which set aside a sentence for commenting on a closed case, Chief Justice Smith said:<sup>32</sup>

American newspapers in response to public demand therefor have assumed the duty of giving the people full information of the conduct of public officials, including the judges of all courts. Such information is necessary in a Democracy in order to insure the observance of its processes. . . . "The people have a right to know how its judicial, as well as its executive officers, perform their duty, and publicity of the acts and doings of court officials serves as a material factor in keeping the stream of justice unpolluted."<sup>33</sup>

If we consider the actual harm to justice from discussion in the press, it is plain that chronological lines drawn at the beginning and end of the period that a case is in court, though less open to criticism than a geographical line around the courthouse, are not entirely accurate boundaries of the period of danger, either for what they leave out or for what they include.

### DANGERS TO JUSTICE FROM PRESS DISCUSSION BEFORE AND AFTER FORMAL LITIGATION

*Discussion before the case begins* has rarely been penalized in the United States. In most contempt cases courtroom proceedings were already under way. Perhaps some courts would not wait so long, but they would probably at least require that a writ had been issued or a criminal charge formally made, in order to make comment punishable. Yet it is possible to poison the wells of justice before the court has taken its first drink. Prospective litigation which will affect many persons disadvantageously can in fact be prevented by threats from ever getting into a court. Suppose that a newspaper announces day after day that if any landlord brings a suit to evict a

<sup>32</sup> *Sullens v. State*, 191 Mississippi Reports 856 at 874 (1941).

<sup>33</sup> Patterson, *Free Speech and a Free Press* (1939), p. 151.

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former serviceman, no matter how far his rent is in arrears, all patriotic citizens will see to it that the dastard is ridden on a rail, his windows broken, and so on. Some timid souls who were about to start eviction proceedings will be as much deterred as if the same threats had been published after action was brought.

Such anticipatory stifling of court cases is probably rare, but unfortunately the vitiating of criminal trials by advance newspaper sensationalism is familiar to everybody. As soon as a suspect is arrested, and even before he is indicted, he may be adjudged guilty by giant headlines. Very likely this kind of early discussion of criminal cases does more harm than what is printed during the actual trial. It makes the selection of impartial jurors much longer and harder and creates a tension in the community which is too strong to be relaxed by a later abstention from comment. As Mr. Justice Holmes said, "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere."<sup>34</sup>

A notable example of press predetermination of guilt occurred in the case of Tom Mooney. A subcommittee to which I belonged carefully examined the San Francisco newspapers *before* the trial and found them publishing daily bulletins handed out by the police or the prosecutors, setting forth all sorts of evidence asserted to connect Mooney and Billings with the bomb explosion during the Preparedness Day parade. Much of this alleged evidence was never introduced at the trial. Stories of this sort were resumed during the selection of the jury. After the trial really began, newspaper discussion was limited to actual events in the courtroom, but we

<sup>34</sup> Dissenting in *Frank v. Mangum*, 237 United States Reports at 349 (1915).

## CASES NOT "PENDING"

concluded that the effect of the pretrial press was one of the main elements in rendering Mooney's trial unfair.<sup>35</sup>

In spite of the harm sometimes caused by publications before a case begins, the law is wise in its reluctance to include them in its general definition of contempt. Otherwise the definition might cover much discussion which is just as well left alone. The start of a case in court is now like a red flag which warns newspapers to be very careful what they say. If the legislature thinks that pretrial intimidation of parties, prospective jurors and witnesses, etc., is dangerous, it can pass specific statutes punishing such conduct. Nonintimidating though ill-considered comments on a future case are published before the judge is in the agony of decision and so are not sufficiently disturbing to be legally checked.

On the other hand, editors ought to realize the real possibilities of injury from pretrial discussions, especially about sensational crimes, and feel a moral obligation to temper what they print accordingly.

*Discussion after a case has wholly closed* cannot, in itself, mold what has already been decided. Yet the prospect of a subsequent vitriolic attack may have been a factor in the judge's mind while passing on the case. Assume that it was a very close and complicated case involving a workman and his employer. If the judge knew from past experience that every time he decided against a laboring man, he was denounced next morning as a harpy preying on the vitals of the poor, thoughts of what he could look forward to this time if he let the employer win might make it very difficult for the judge to

<sup>35</sup> *The Suppressed Mooney-Billings Report* (1932), pp. 94-115. The title is misleading since this document was not "suppressed" by the Wickersham Commission. It was finished so late that the Commission did not have time to give it the careful examination it required and so did not publish it. See the review by E. M. Morgan, 46 *Harvard Law Review* 726 (1933).

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study the voluminous evidence and conflicting precedents with the calm attention they required.

Still, the agony of decision is only indirectly affected by what is still unpublished, and the weight of authority seems sound in ignoring this risk of harm. Otherwise, the argument about the retroactive consequences of vituperative publications about a closed case would supply resentful judges with a weapon to silence adverse criticism of their judgments and judicial opinions. They might mix up vitriolic comments with legitimate discussion in their condemnations, whereas, so this book has repeatedly insisted, bad taste is not a proper test for suppression. The writing of law-review comments on current cases would become a dangerous trade.

Furthermore, a closed case is not always an isolated phenomenon. It may be one of a series of litigations which form part of a single underlying matter like the settlement of a decedent's estate or the reorganization of a railroad. Or it may be one of numerous cases involving various persons in a common situation of widespread interest. For example, the contempt case in which resentment against Judge Peck provoked Congress into passing the Act of 1831 was based on the intemperate newspaper letter from a lawyer appropriately named Lawless about a case he had lost before Peck, upsetting a claim under an old Spanish land grant.<sup>36</sup> There were at the time thirty-seven similar claims pending which involved a similar question as to Spanish land grants, in eight of which Lawless was appearing; and over a hundred and fifty more such cases were filed immediately after the publication, half of them by Lawless. What he wrote about this one case was bound to promote sympathy with all the other land claim-

<sup>36</sup> I treat this case as closed, although an appeal was pending. See below, pp. 429-31.

## CASES NOT "PENDING"

ants, making fair juries almost unobtainable in their cases.<sup>37</sup> Such a linkage between a closed case and pending cases is very common, and we cannot ignore the danger to the companion suits not specifically mentioned. Yet it is probably better to avoid it by voluntary restraint on the part of newspapers than to stretch the established boundaries of contempt. To include these chain reactions would bring much else within the threat of suppression. Judge Hays of Missouri recently put the matter very well:

But, if right to criticize a closed case is to be denied simply because a case involving a similar issue is still pending, it would be so greatly curtailed as to be valueless. Nor can the simple fact that the same party appears in both cases be determinative. Sometimes a large number of cases are filed against one defendant. Could it be contended that a writer must wait until the last of these cases was decided before uttering any criticism of the decision in the first?<sup>38</sup>

Here, again, editors have a moral duty to exercise a gentlemanly restraint.

### TWILIGHT ZONES

When is a case no longer "pending" so as to allow a newspaper to comment freely on a past decision? This question has caused much trouble. Lawyers and judges speak of a litigation as pending until the final judgment is entered, the clerk writes "closed" in the docket, and all the papers are bundled up to be put in storage. Yet a newspaperman looks at the matter quite differently. During the course of the case a judge hands down some decision which arouses widespread public interest. For him it is "news"—like other news it will evaporate in a day or two. If the public is to be enlightened, he must speak

<sup>37</sup> Nelles and King, *op. cit.*, pp. 423-31.

<sup>38</sup> *State ex rel. Pulitzer Pub. Co. v. Coleman*, 347 Missouri Reports 1238 at 1260 (1941), noted in 26 Washington University Law Quarterly 564.

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out at once or his criticism will get no readers. The decision is now history, and he gives it what he thinks it deserves. Suddenly he finds himself charged with contempt of court.

Why? What he prints about yesterday's decision cannot coerce or confuse its character. He may be vaguely aware that there will be later proceedings, but nothing is going on in court about that case now. For the judge, on the contrary, this decision has been made, but the case is far from over. Asepsis from the contagion of popular outcry should not end with one operation but be maintained until the patient is discharged from the hospital. Which is right?

Two frequent situations raise this difficulty: (a) when the case will continue in the hands of the trial court which has made the criticized preliminary decision and (b) when the trial court has disposed of the case by its decision but an appeal has been lodged with an upper court.

*Criticism of a preliminary decision in a continuing case.*—The *Craig* case illustrates this situation. Judge Mayer had to supervise the reorganization of New York traction companies. He appointed a receiver early in the suit. Soon afterward he refused to appoint an official of the city as co-receiver. He had settled that question without interference from without. Yet the case, in his eyes, was "pending." It would call forth his best energies for years. Considerations urged by Craig against his recent decision might very likely have some bearing on later questions coming before him. Indeed, this very issue of making Craig co-receiver might come up again; in denying the request, Judge Mayer had said that it could be renewed. So he brought contempt proceedings to ward off embarrassment in reaching future decisions. Nevertheless, it was too soon for Judge Mayer to need protection, as Justice Holmes pointed out in his dissent:

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. . . . There was no matter pending before the Court in the sense that it must be to make this kind of contempt possible. It is not enough that somebody may hereafter move to have something done. There was nothing then awaiting decision when the petitioner's letter was published. . . . A man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, any more than he can for exciting public feeling against a judge for what he already has done.<sup>39</sup>

This sort of situation resembles that already discussed—criticism of a wholly closed case which is related to future cases. Judge Peck would not allow an attack on his action early in a series of land-claim cases involving the same issue; and Judge Mayer would not allow an attack on his action early in a series of decisions inside a single case. It is a mistake to apply a formal test in either of these situations—for example, to draw fine distinctions between different ways in which a suit can be pending between *interim* decisions. The real question is whether the newspaper talks at a time when the judge is in the agony of decision. If what is said about a past issue is really aimed at a related *present* issue with which the judge is already struggling, then a serious problem is presented. But if the related issue lies in the *future* and the judge is now busy with something else, there is no sufficient interference with justice to warrant a charge of contempt.

This sort of twilight zone between technical pending and popular nonpending may come in all sorts of ways. The trial court has decided the case, but a motion for a new trial is pending as in the *Bridges* case. Or an indictment for a crime has been dismissed by the prosecutor but may perhaps be reinstated within the term of court. This happened in a recent Missouri case, already discussed,<sup>40</sup> where the judge wanted to

<sup>39</sup> *Craig v. Hecht*, 263 United States Reports at 281-82.

<sup>40</sup> Above, n. 38, at 1261.



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punish an editor for calling the proceedings "A Burlesque on Justice," on the ground that the case was pending during the whole term; but Judge Hays said that such a theory would "narrow the limits of permissible criticism so greatly that the right to criticize would cease to have practical value."

In 1946 this twilight zone problem came before the Supreme Court in the *Pennekamp* case.<sup>41</sup> The *Miami Herald* excoriated the whole trial bench of the county for preliminary decisions in cases which were obviously still before the court for subsequent adjudication. Two editorials clearly suggested that the judges went out "to find every possible technicality of the law to protect the defendant, to block . . . prosecution" and that "technicalities are to be the order and the way for the criminally charged either to avoid justice altogether or so to delay prosecution as to cripple it." The first editorial was accompanied by a cartoon which caricatured the court as a complacent judge on the bench tossing aside formal charges to hand a document marked "Defendant dismissed" to a powerful thug, while a futile person labeled "Public Interest" protested in vain. The editor based his attack on several specified rulings, which he seriously misstated. For example, he denounced the dismissal of eight indictments for rape, without saying that this was done with the consent of the prosecutor after he had told the judge that he would have the defendants immediately reindicted by the grand jury, which was still in session, or indicating that new indictments next day left the defendants at least as badly off as they were before the judge's ruling. The highest court in Florida said, and the Supreme Court apparently agreed:

<sup>41</sup> *Pennekamp v. Florida*, 66 Supreme Court Reporter 1029 (1946), Justice Jackson did not participate.

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The record . . . in all these cases . . . does not reveal a breath of suspicion on which to predicate partisanship and unfairness on the part of the judges. It is shown rather that they acted in good faith and handled each case to the very best advantage possible. There was no judgment that could have been entered in any of them except the one that was entered.

The trial court fined the newspaper \$1,000 and the associate editor Pennekamp \$250, saying: "To report on court proceedings is a voluntary undertaking but when undertaken the publisher who fails to fairly report does so at his own peril."

The highest Florida court sustained these sentences, but the Supreme Court set them aside. Although the decision itself was unanimous, four different opinions were filed. In large measure these restate the issue of the *Bridges* and *Times-Mirror* cases as to freedom versus justice, and Justice Murphy's brief concurring opinion deals entirely with that subject. I shall have to omit much interesting discussion and speak now of the varying views in the other opinions concerning our twilight-zone problem.

Justice Reed, in delivering the opinion of the Court, expressly recognized that the rape cases were pending at the time of the editorials and that the latter did not state objectively the attitude of the judge. Yet, when it is proposed "to close the door of permissible public comment," the real question is the effect on the administration of justice *in the future*. Under this test the possible harm from the editorials and cartoon did not constitute clear and present danger to subsequent decisions by either a jury or a trial judge:

They concerned the attitude of the judges toward those who were charged with crime, not comments on evidence or rulings during a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion. . . . Certainly this criticism of the judge's inclinations or actions in these pending non-jury proceedings could

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not directly affect [a fair administration of justice]. This criticism of his actions could not affect his ability to decide the issues. Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.

It is suggested, however, that even though his intellectual processes cannot be affected by reflections on his purposes, a judge may be influenced by a desire to placate the accusing newspaper to retain public esteem and secure reelection presumably at the cost of unfair rulings against an accused. In this case too many fine-drawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or support or a powerful and vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions.

Justice Frankfurter's concurring opinion, besides its important bearing on other aspects of the relationship of press and courts which are discussed in this book, has a closing analysis of the problem of comment on preliminary decisions. He differs from Justice Reed in thinking that the Florida cases were not "pending":

. . . . For purposes of punishing for contempt as interference, the cases were not actively pending. . . . The important considerations are whether any proceedings have been taken to put the issue into court and whether it is still there. Where the power to punish for contempt is asserted, it is not important that the case is technically in court or that further proceedings, such as the possibility of a rehearing, are available. "When a case is pending is not a technical, lawyer's problem, but is to be determined by the substantial realities of the specific situation." *The decisive consideration is whether the judge or the jury is, or presently will be, pondering a decision that comment seeks to affect.* Forbidden comment is such as will or may throw psychological weight into scales which the court is immediately balancing. . . . In the situation before us, the scales had come

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to rest. The petitioners offended the trial court by criticizing what the court had already put in the scales, not by attempting themselves to insert weights.<sup>42</sup>

Justice Rutledge is more lenient than his colleagues toward the *Miami Herald* for its misstatements of judicial acts.

One can have no respect for a newspaper which is careless with facts and with insinuations founded in its carelessness. Such a disregard for the truth not only flouts standards of journalistic activity observed too often by breach, but in fact tends to bring the courts and those who administer them into undeserved public obloquy.

But if every newspaper which prints critical comment about courts without justifiable basis in fact, or withholds the full truth in reporting their proceedings or decisions, or goes even further and misstates what they have done, were subject on these accounts to punishment for contempt, there would be few not frequently involved in such proceedings. There is perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news.

Some part of this is due to carelessness, often induced by the haste with which news is gathered and published, a smaller portion to bias or more blameworthy causes. But a great deal of it must be attributed, in candor, to ignorance which frequently is not at all blameworthy. For newspapers are conducted by men who are laymen to the law. With too rare exceptions their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great. But this is neither remarkable nor peculiar to newsmen. For the law, as lawyers best know, is full of perplexities.

In view of these facts any standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one. Unless the courts and judges are to be put above criticism, no such rule can obtain. There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government.

<sup>42</sup> *Ibid.* at 1048. (My italics.) Justice Frankfurter's quotation comes from his dissenting opinion in the *Bridges* case.

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This, I venture to think, is too indulgent to human frailty. It is the business of a newspaper to find out exactly what happened, especially when the facts are undisputed and a matter of public record. This editor fell down badly in his own chosen job. Nobody expects him to have an offhand mastery of technicalities, but when he goes out of his way to deal with a technical situation like the quashing of indictments, and make them the basis of attacks on an important institution, then he does have some obligation to master the technicalities and know what he is talking about. I do not call for the accuracy of an honor student in a law school, but the editor can at least avoid glaring blunders. Baseball has its technicalities too, but sports reporters are required to understand them. Mr. Pennekamp would have fired a reporter who thought that the short-stop is the man who stands behind the batter and stops balls short.

Of course, a newspaper is not punishable for vituperative incompetence in describing most kinds of technical activities. Instead, the maligned person points out the errors in a letter to the editor or in another newspaper, and occasionally he sues for libel. Why should not the Florida judges be relegated to similar forms of vindication? Because a judge is reluctant to step down into the arena of newspaper controversy and libel suits for fear of cheapening his court. The harm which the community suffers from receiving an untruthful account of the decisions of its courts is too great to be left to such a doubtful chance of correction.

This does not mean that I think misstatements should be punished but only that they should be corrected. Hence the outcome of the *Pennekamp* case is unsatisfactory. The proper remedy was to order the *Miami Herald* to publish a retraction containing an accurate account of the decisions it had pre-

vously criticized.<sup>48</sup> Probably the Florida courts rather than the Supreme Court would have to select such a remedy. The Supreme Court could consider only the fines actually imposed. Still, in order to have power to compel such a retraction, the court must be enabled to characterize the misstatement of a decision as contempt of court, and the Supreme Court has made this impossible by denying that the misstatements were contempt at all.

The principle about twilight zones which seems to be supported by the *Pennekamp* case is this: In considering whether comments on a past decision are an interference with justice, they should not be judged in relation to that decision, except perhaps when they grossly misstate the facts of the court's action; the basic question concerns their effect on later stages of the case, especially the next stage. One can imagine a situation where such comments would constitute a serious interference with the subsequent disposition of the case, which would weigh heavily against the policy of freedom of the press. Suppose that after the Florida rape trial had begun, the newspaper attacked the previous dismissal of the original indictments as exhibiting judicial sympathy with outrageous criminals. This editorial might easily affect the conduct of the trial, although it did not say a word about it. Yet such a short twilight zone is unusual. In most cases, there is a long lull after any significant decision; and adverse criticisms published while this is still news are likely to be forgotten before the next period of court activity in the case. We are not now concerned with the more prolonged influence of intimidation during a twilight zone.

*Criticism of a lower court's decision which has been appealed.*

—The principle just stated applies a fortiori when the trial

<sup>48</sup> For authorities supporting this remedy see above, n. 28.

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court has decided a case and it has gone to a higher court. Whatever is said about the trial judge is little likely to aggravate the agony of decision months away on the part of judges who are not attacked and who, from the nature of their work, are less susceptible to atmospheric disturbances. The danger of interference with justice is small, and the need for freedom of discussion is much greater than in the case of preliminary rulings, because the fate of a case is often settled in the lower court. What the trial judge decides about the facts may tie the hands of the appellate court, as my presentation of the *Strange Fruit* case showed.<sup>44</sup> At any rate, the public has strong reasons for wanting to be told about the quality of his work while it is news. Suppose that we had the English rule that a newspaper may publish nothing about a trial but what has "taken place in open court" until the appeal is decided.<sup>45</sup> This rule may be suited to conditions in England, where appeals are rapid, but it would work very badly in the United States. Imagine the American people obliged to wait until 1927 before reading any discussion of Judge Webster Thayer's conduct of the *Sacco-Vanzetti* case in 1921.<sup>46</sup> Few sensible persons would say that the *Atlantic Monthly* should have been heavily fined for publishing six years after the jury's verdict, before the formal appeal was argued in the highest Massa-

<sup>44</sup> Above, pp. 221-26.

<sup>45</sup> *Rex v. Davies*, above, n. 27; compare Note, 57 *Judicial Review* 125 (1945). Also, even if no appeal is taken, the newspaper must wait until the time for appealing has run out. In this country such a rule would prevent discussion of many decisions in the highest state courts until weeks later, because the loser might conceivably ask for a review in the United States Supreme Court.

<sup>46</sup> That his conduct deserved public discussion is shown by the admirable survey of this case in a book review by E. M. Morgan, 47 *Harvard Law Review* 538 (1934).

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chusetts court, a temperate examination of the issues<sup>47</sup> by a law professor who then held the same ideals which now make him the most vigorous supporter of an unswerved state judiciary among the Justices of the United States Supreme Court.

Several years ago the *Harvard Law Review* was taken to task by some graduates of the School because it occasionally made comments on a lower-court decision while an appeal was pending. Julian Mack, one of the ablest of United States Circuit judges, in speaking at the School soon afterward, expressed the hope that the *Review* would continue its practice, because he and other judges who had to decide the appeal found such discussion very helpful in understanding the questions before them.<sup>48</sup>

### THE PROPER RELATIONSHIP BETWEEN THE PRESS AND THE COURTS

The preceding discussion has, I hope, led readers to believe that contempt cases, however decided, merely scratch the surface of the real trouble between press and courts. A few out of many instances of improper press influence on verdicts and decisions are punished as contempt, but hundreds equally bad go untouched.<sup>49</sup> An occasional judge has his arbitrary conduct checked by the United States Supreme Court, but the Justices cannot afford to take time away from railroads, nationwide labor disputes, monopolies, and treaties to write thirty or forty pages of opinions every time a trial judge gets unduly excited over a newspaper paragraph. And it is not just a ques-

<sup>47</sup> Frankfurter, "The Case of Sacco and Vanzetti" (March, 1927), reprinted in his *Law and Politics* (1939), p. 140.

<sup>48</sup> See also Chief Justice Hughes, "Foreword," 50 *Yale Law Journal* 737 (1941).

<sup>49</sup> See the quotation from Clarence Darrow in 66 *Supreme Court Reporter* at 1045, n. 11.



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tion of haphazard enforcement of the existing legal rules against editorial or judicial excesses. The point I want to make is that these excesses are only manifestations of the attitude of judges toward the press and of newspapers toward the courts. Neither side sufficiently understands the nature of the service rendered to the community by the other side. This mutual misunderstanding is the root of the whole matter. It cannot be removed by isolated attacks on abuses which violate the existing law of contempt. It produces many harms in the press, such as sensational reports of criminal trials and inadequate accounts of important unspectacular litigation, which are not contempts and cannot be cured by any kind of law. The underlying attitudes of judges and editors have to change.

Many judges do not understand why the press in a modern society should express opinions about pending trials and forthcoming decisions. They are steeped in doctrines of contempt of court which developed while newspapers were in embryo. It was natural for judges in the eighteenth century, when a newspaper was "a snapper-up of unconsidered trifles," to feel that its comment on the work of a court was a mischievous impertinence. It was natural for this attitude to continue in the early nineteenth century, when most newspapers were unscrupulous vehicles of political partisanship. Judges refused to become targets for the streams of abuse they saw constantly directed against legislators and officeholders. Consequently, within our own lifetimes many judicial opinions sustaining punishments for contempt show little awareness that the press is now the nervous system of the community. In a modern society the public needs to learn not only the bare facts of important events but also their significance. This need cannot be adequately met if the press is barred from

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expressing opinions about an outstanding class of important events, namely, proceedings in the courts.

For it is a commonplace that what judges do has frequently great public importance, especially in the United States, where they have the last word on the meaning of a constitution or a statute. The case of portal-to-portal pay for coal miners shows that more excitement can be caused by what judges read into a statute than by its enactment. Of course, some cases attract newspaper attention merely because they are crime mysteries or human-interest stories of what happened to the two parties, but others because their outcome will benefit or hurt thousands of people. Judge Killits and Judge Mayer had control of the transportation of a large city and could hardly escape eager attention from citizens who needed to know whether they would lose from high fares or from the bankruptcy and stoppage of operations which might result from low fares. There is nothing novel in the occasional occurrence of a lawsuit which is treated as a great public event. When Lord Mansfield was deciding the liberty of Wilkes, he was a symbol of the upsurge of the mercantile and urban population against the rule of landowners,<sup>50</sup> which culminated in the Reform Bill of 1832. The case before Judge Peck was a phase of the long contest between those who plowed and cleared fertile land and the distant owners of pieces of paper. Under our system a great controversy involving multitudes may be settled by a suit between John Doe and Richard Roe. This is as it should be. It is right to have it settled by judges and not by street rioters or rural guerrillas. Yet a judge ought to expect that his prospective decision will arouse newspaper controversy as did the riots and land wars for which it is the fortunate substitute. The community is en-

<sup>50</sup> On Wilkes see FSUS, pp. 242-47.

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titled to understand the reasons and the significance of whatever will mold its life.

I am far from meaning that everything that is said in a newspaper about a pending case is desirable or actually contributes to popular understanding of what the judge is doing. Much comment is very undesirable, whether legally contempt or not, like the observations of Bridges and the *Los Angeles Times*. Still, here as elsewhere in the problems of free speech, the bitter must usually be taken with the sweet. Condemning bad criticism of the courts will not automatically produce the large amount of good criticism which the community needs. Instead, good criticism has to be affirmatively encouraged in all sorts of ways. Max Radin remarks: "We are a garrulous and querulous people. It would be better if we talked and complained less. But it would not be well if we mended our manners out of fear of fine and imprisonment and not out of a growth in the amenities of civilized living."<sup>51</sup>

If judges come to appreciate the value to the community of learning the significance of what they do, enough to steel themselves against hostile outcry as Lord Mansfield did, they may find themselves also learning from newspaper comment on their work. Even editorials which are so vituperative as to be punishable under the doctrine of the *Times-Mirror* case can be grist to the mill of a wise judge. Although their arguments will not sway him, they may widen his understanding of the consequences of a decision either way, and direct his attention to relevant considerations which he might otherwise overlook because of his predispositions or early training. An intemperate argument, though logically worthless, some-

<sup>51</sup> "Freedom of Speech and Contempt of Court," 36 *Illinois Law Review* 599 at 615 (1942).

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times reveals social and economic conditions outside the judge's experience. A wise judge will not yield because of this, but he will investigate the new facts, in so far as the law permits him to take judicial notice of them without having evidence thereof produced in court. If such a receptive attitude to hostile discussion had been cultivated by judges early in this century, many regrettable decisions might have been different. As it was, the judges in labor injunction cases were often unaware of the real nature of labor unions and their strategy; and the courts which emasculated the early Workmen's Compensation Acts lacked the understanding of the previous law of industrial accidents which they could have obtained if they had listened to editorials a little and then started reading sober volumes on the operation of the fellow-servant rule.

When juries have to be protected, a special situation exists; but, when the judge has to protect himself, he can best do so by learning from his critics or ignoring them. Every man ought to build in his own mind a refuge to which he can retire for renewed strength whenever he is greatly vexed by what others say about him. One way to accomplish this is to have a few reassuring quotations and reflections close at hand. It might be a good idea for a sensitive judge to keep in the top drawer of his desk in chambers three inscribed cards—one containing Lord Mansfield's statement in the *Wilkes* case,<sup>52</sup> another Darwin's "No man was ever written down except by himself," and the third just "Laugh it off."

The attitude of newspapers toward courts calls for more extensive changes, because they print hundreds of times as much about law cases as judges say about the press. Let us start with the basic need of the community to understand

<sup>52</sup> Above, pp. 387-88.

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how justice is actually administered and ask whether the press is meeting that need as well as it is capable of doing.

First, leave aside all the controversial questions about expressions of editorial opinion and consider court proceedings as straight news. Does the press satisfy the need of readers for an intelligent knowledge of what has actually taken place in open court during a case? Newspapers perform a notable service in having their representatives in the courtroom, for public trials are essential to liberty. The Sixth Amendment says: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." The same practice prevails in all other cases except in courts-martial and a few situations where, for reasons of decency, etc., it is thought not to be possible to administer justice in open court.<sup>53</sup> The press multiplies this essential publicity a thousand fold beyond the immediate spectators. No secret Gestapo can sit under our law and condemn civilians.

So far so good, but does the information now given about trials tell citizens what they ought to know about the operation of one of the three principal branches of their government? Elsewhere in this book<sup>54</sup> I have spoken of the unsatisfactory effect of verbatim reproduction of testimony with almost no attempt to piece a day's proceedings together and connect them with the previous course of the trial. Readers ought to be able to see the way in which the case unfolds to the jury, but now they get something very different, as an experienced New York lawyer has pointed out:

"An intelligent forecast as to how a trial will result can seldom be made from the ordinary newspaper account. This is

<sup>53</sup> As to courts-martial and other proceedings in secret, see Comments, 27 *Harvard Law Review* 88 (1913) and 30 *ibid.* 771 (1917).

<sup>54</sup> Above, p. 82.

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due not alone to inaccuracy in reports, but also to the undue accentuation of sensational, though irrelevant, evidence, to so-called 'stories' padded with matters of more or less remote inference, to unworthy wrangling of counsel, or to equally irrelevant homilies of judges. Industrious reporters interview prospective witnesses and publish what they say. Their statements are without the sanction of an oath and are not subjected to the test of cross examination. . . . Evidence or instructions having the effect of completely neutralizing irrelevant or unimportant matters thus published are either omitted or so subordinated that a misleading picture is presented. The case is, therefore, not presented to the reading public as it is to the judge and to the jury, and where a decision or verdict is rendered contrary to what readers might reasonably expect, to some extent the confidence of the public in the judicial process must be impaired."<sup>55</sup>

In short, a trial is treated as drama and not as the business of government. The reader is not told what the trial is all about. He does not get an intelligible picture of the two conflicting views of critical facts. I may seem to be asking for a newspaper from Utopia, but the very kind of courtroom reporting we need is in any issue of the *London Times*. Here is a sample from the first number to come to hand:

### KEETCH AND OTHERS v. LONDON PASSENGER TRANSPORT BOARD

*Before MR. JUSTICE WYNN PARRY*

An application for an interim injunction was made by the plaintiffs, Mr. A. J. Keetch [and others], employees of the London Passenger Transport Board [defendants, operators of the London subways, busses, etc.], in an action in which they are claiming . . .

"Henry W. Taft, "The Press and the Courts," 58 *American Law Review* 595 at 597-98 (1924), reprinted in his *Law Reform* (1926), pp. 143-44. This is quoted by permission of the Macmillan Co., New York, publishers.

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an injunction restraining the defendants from making it a condition of the plaintiffs' employment that they or any of them should join the Transport and General Workers' Union; . . . and . . . restraining the defendants from dismissing the plaintiffs . . . from their or his employment solely by reason of their failure to join any such union. . . .

MR. PAULL [for plaintiff] said that . . . he had asked the defendants to give an undertaking for one week not to take action against the plaintiffs. The defendants were unable to assist him in that way, and it therefore became necessary for him to apply for an injunction *ex parte*.

MR. ROBERTS [for defendants] said that the defendants took up the position that what they had done with regard to the plaintiffs was strictly within their legal rights. They had very important duties, not only to their employees but also to millions of the public, and they felt that the course which they had taken was the only one open to them. He wished to do nothing which would lend any colour to the suggestion that there was anything at all in the plaintiffs' action.

MR. JUSTICE WYNN PARRY asked what was the urgency for a week.

MR. PAULL replied that, unless some undertaking was given by the defendants, or an injunction granted, there was nothing to prevent the defendants from doing what they had done in the case of certain other employees and say: "If you do not join this union we will dismiss you."

MR. JUSTICE WYNN PARRY inquired if there was any evidence that the defendants threatened to dismiss the plaintiffs before next week. . . . He should want very strong evidence before granting an *ex parte* injunction. . . .

MR. PAULL. . . . The board had issued a statement saying that they would not employ any person who would not join the Transport and General Workers' Union. That was published on August 26.

HIS LORDSHIP said that, even although the defendants offered no undertaking, it must be borne in mind that they were a very responsible body and obviously intended to deal fully with the case, and it was for Mr. Paull to decide at what stage he was going to give battle.

MR. PAULL replied that he was extremely anxious that the plaintiffs' interests should be protected.

MR. ROBERTS said that it would probably be realized why he could not give any undertaking. It was difficult to anticipate what might happen in a week. It was the paramount duty of the board to pro-

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vide transport facilities for 10,000,000 people. It might be that the union members would refuse to continue to work with non-union men and the defendants might be faced with an industrial dispute on a very large scale. The board did not wish to act unreasonably towards the plaintiffs. They were most anxious that the matter should be disposed of as far as possible in public that day so that the broad facts in relation to the plaintiffs' contracts might be made public, as the matter had been mentioned and discussed in the newspapers.

MR. PAULL said that that was also the plaintiffs' desire. He was only anxious that day to make sure that the plaintiffs' rights should not be disturbed for a few days.

MR. JUSTICE WYNN PARRY said that he thought it best that the matter should stand over until Wednesday next, when, if the evidence was complete, he would be prepared to begin the hearing of the action and continue until it was finished.<sup>66</sup>

Notice that the very strict English law against comment on pending cases has not prevented the *Times* from using indirect discourse, which is more intelligible than our practice of verbatim quotation. The reader can see just what the issue is, what position each side takes, what the judge does.

Work of this quality requires a reporter who can write about law the way a music critic writes about concerts or a reviewer about books. Such competence seems a suitable investment for a prosperous newspaper in view of the large number of lawyers and of other readers who appreciate the impact of decisions on their own businesses and organizations or are eager to learn about court cases as public events. No doubt, we have many more courts than the English, and it would be too much to relate every case with the skill of the London *Times*. Yet many papers could afford to retain a man with legal training and experience who could be dispatched to take care of trials or arguments which look important.

<sup>66</sup> The *Times*, September 12, 1946, p. 2. The whole case occupies two-thirds of a column; the omitted passages are short.



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Of course, when a sensational trial occurs, there are plenty of reporters present, but hardly of the type just indicated. And if the cause is of nation-wide interest, as in the prosecution of Bruno Hauptmann for kidnapping a child, so many newspapers seek to be represented that an orderly trial is almost impossible. The emphasis of the press on drama drives out any sense of decent working conditions for a judge and a jury. The swamping of the courtroom in the *Hauptmann* case by reporters, photographers, and radio commentators and their microphones led to the formation of a Special Committee on Cooperation between Press, Radio and Bar as to Publicity Interfering with Fair Trial. It had members from the American Bar Association, the American Newspaper Publishers Association, and the American Society of Newspaper Editors. The respective chairmen were Newton D. Baker, Paul Belamy of the *Cleveland Plain Dealer*, and Stuart H. Perry of the *Adrian Telegram* in Michigan. Their final report in 1937 declared: "The trial of a criminal case is a business that has for its sole purpose the administration of justice, and it should be carried on without distracting influences." In excoriating the excesses of the *Hauptmann* case, they were "moved less by spirit of censure than by hope of remedial action." Their many important recommendations and indeed the whole report should be repeatedly studied by prosecutors, defense lawyers, newspapermen, and those concerned with radio.<sup>57</sup>

Arrangements to avoid overcrowding the courtroom during a trial of nation-wide interest cannot be improvised at the last moment after the arrival in town of representatives from every press agency, broadcasting company, and leading news-

<sup>57</sup> This report is printed in 62 Reports of the American Bar Association 851-86 (1937). The recommendations are quoted in the *Pennkamp* case, 66 Supreme Court Reporter at 1044, n. 9.

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paper in the United States. There is not enough seating capacity to hold a fraction of them and give them proper facilities for note-taking. On the other hand, preferential treatment of particular newspapers, etc., is outrageous. All readers and radio listeners are entitled to learn what is going on. A possible way out would be for all these instrumentalities of mass communication to arrange weeks ahead to pool their resources and send to the trial a few men of unusually high competence in the reporting of legal cases, whose accounts would be distributed to every member of the pool for publication. Such a syndicating of the trial would greatly promote the orderly conduct of the case and at the same time take advantage of the general interest in crime mysteries to make citizens understand better how American criminal justice is administered and why we preserve hard-won safeguards against mistakes, prejudice, and oppression.

Arguments in appellate courts are now hardly reported at all. Of course, Supreme Court decisions receive adequate attention, but the day in court which precedes each decision is almost ignored. I have rarely seen a published account of the biggest sort of case which related the questions asked by various Justices and the answers evoked. Yet such questions are very significant of the Court's attitude, not only toward the particular case, but also toward many related questions which are likely to come before it later. Law reviews cannot afford Washington correspondents to do this valuable job, but a large newspaper could do it if it only cared to. Inasmuch as editors know about most of the important cases before they are argued, it would be easy to have a skilful writer on hand. Newspapers have long had experts in sport and finance on their staffs. In the last few years several of the best owners have seen the wisdom of hunting for specialists in labor prob-

## CONTEMPT OF COURT

lems. The press has greatly improved its presentation of new discoveries in science and medicine. If some metropolitan journal would try the experiment of retaining an able young lawyer to do a weekly column describing recent arguments in the Supreme Court, it would, I believe, receive an astounding welcome from lawyers, investment bankers, professors, and labor leaders. Of the fields now untouched by the press, this would most repay cultivation.

Finally, as to expressions of opinion. If the reporting of what actually happens in the courtroom be improved in ways like those suggested, I venture the prediction that much of the long-standing trouble about editorial comments on pending cases will fade away. The chief present value of such comments is to tell citizens the significance of a case, but this can be accomplished as well or better by a good objective account of the trial or the appellate arguments. The account of the closed-shop case in the London *Times* has not a word of comment, but the reader knows exactly what the case was about and sees its significance.

Furthermore, when newspapers come to have editors and legal experts who understand what judges are trying to do and the way they go about it, there will be less readiness to interfere with their work. Any sensible passenger on a bus knows enough not to talk to the driver on a rainy night. The task is too delicate for interruptions. Judges are not perfect any more than editors, but, like editors, they are not made better by intemperate denunciations and adjurations. Indeed judges are likely to do worse after their thinking is disturbed, as much of the preceding discussion has shown.

Thus a changed attitude of the press toward the courts will reduce both punishable comments on pending cases and discussion which, without being contempt under the *Times*-

## PROPER RELATIONS OF PRESS AND COURTS

*Mirror* doctrine, will nonetheless be seen to be undesirable. No more need be said here on this general subject, because newspapermen can find admirable discussions by the committee formed after the *Hauptmann* case,<sup>58</sup> by other writers,<sup>59</sup> and, above all, by Justice Frankfurter in his concurring opinion in the *Pennekamp* case.<sup>60</sup> Since this should be read in its entirety in every school of journalism, newspaper office, and broadcasting station, I shall quote only one paragraph which voices the conclusions reached independently by the Commission on the Freedom of the Press:

A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise.<sup>61</sup>

<sup>58</sup> Above, n. 57.

<sup>59</sup> See Nelles and King, *op. cit.*; Radin, *op. cit.*, and Taft, *op. cit.*

<sup>60</sup> 66 Supreme Court Reports at 1039.

<sup>61</sup> *Pennekamp v. Florida*, 66 Supreme Court Reports at 1042 (1946).

## *DIVISION D*

### *PROTECTION AGAINST EXTERNAL AGGRESSION*

**S**INCE this book is mainly concerned with the press in normal time, I shall do little more than sketch the situation during hostilities. Also the Office of War Information will be deferred to Part III of this book because it involves the government as a party to communication. At the moment we are considering only restrictive activities.

The relation between external disorder and foreign aggression requires some comment, because my line between them is somewhat blurred. I have already mentioned that some law, e.g., the treason statute, applies to both headings. There is a more substantial overlapping, which must now be considered. I have written as if laws against internal disorder operated only in peace, while those against external aggression operated only in war. Of course, there is no such clear-cut division. The possibility that internal dissensions may be fomented by outsiders as a step toward conquest or other foreign control is as old as Thucydides. The same tactics have been displayed in our own time by the now defunct Moscow International in a dozen countries, by the Rome Fascists in Vienna, by the Berlin Nazis in the Sudetenland, and all over the lot. Foreign aggression need not wait for war. So the law may endeavor to guard against it during an uneasy peace by imposing new

## EXTERNAL AGGRESSION

restraints on communications.<sup>1</sup> Thus the phrase "peacetime sedition" is not wholly dis severed from foreign aggression. Despite the importance of this point, I shall not dwell on it. It involves a crisis like actual war, and this book is not concerned with crises.

<sup>1</sup> See Loewenstein, "Legislative Control of Political Extremism in European Democracies," 88 *Columbia Law Review* 591 and 725 (1938).

## TREASON AND SEDITION IN WAR

TREASON<sup>1</sup>

**B**ECAUSE of the loose interpretation of the word "treason" in English state trials, the Constitution of the United States carefully defines it:

Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.<sup>2</sup>

The use of language falls within this definition to a very small extent. People often fail to realize how improbable it is for anybody to commit treason by printing something in a book or a periodical. Lowell's *Biglow Papers* may have given "comfort" in the popular sense to any Mexicans who chanced to read them, but they were not treasonable. The "aid and comfort" to the enemy must promote his success in some tangible and measurable way. The phrase has been applied to conduct like supplying money, saltpeter for gunpowder, or assisting prisoners to escape. It is true that language does sometimes constitute treason, as when a wireless message is sent from our coast to a German submarine telling it where to land, but here words have all the qualities of action. They furnish the enemy with something he can use. But an editorial denouncing our allies is in quite a different category.<sup>3</sup> Unless it be punishable as a violation of the Espionage Act, it is not a crime at all.

<sup>1</sup> 18 United States Code, secs. 1, 2.

<sup>2</sup> Art. III, sec. 3.

<sup>3</sup> See FSUS, pp. 257-61.

## TREASON AND SEDITION IN WAR

### CONSPIRACY

The federal conspiracy statutes previously considered under "Protection against Internal Violence and Disorder"<sup>4</sup> are, of course, in effect during a war. Six years in prison or a \$50,000 fine or both can be imposed:

If two or more persons . . . . conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States. . . .<sup>5</sup>

This statute was enacted at the outbreak of the Civil War. As President Wilson's legal advisers in 1917 pointed out, there is a gap between conspiracy and treason, which leaves room for a man who all alone actually attempts to interfere with the war by urging others to commit immediate and injurious acts like assaulting a recruiting officer or evading registration for the draft. Congress passed the Espionage Act in order to reach such an isolated individual and thereby, as we shall see, imprisoned a large number of people of a very different sort. After all, one man just talking by himself cannot get very far against the United States government,<sup>6</sup> and it is probable that the old conspiracy statute of 1861 would have taken care of all the really dangerous disloyalists in both world wars.

<sup>4</sup> See above, chap. 14.

<sup>5</sup> 18 United States Code, sec. 6. See also sec. 88 on conspiracy "to commit any offense against the United States," which is punishable by two years in prison and a \$10,000 fine.

<sup>6</sup> A clause of the Selective Service Act of 1940, more carefully drawn than the Espionage Act, hits directly at individual incitement of draft evasions (50 United States Code Appendix, sec. 311). But I have not yet run across a reported case indicating that the government prosecuted anybody for this crime.



## TREASON AND SEDITION IN WAR

### VIOLATIONS OF THE ESPIONAGE ACT

This statute, already discussed in connection with the Post Office, was enacted in 1917 and provides:

Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies (2) and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, (3) or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.<sup>7</sup>

Observe that any crime under this Act by writing or speaking requires two elements: (1) words of the specified forbidden nature and (2) a deliberate intent to interfere with military operations or cause one of the other substantive evils described by Congress.

*The first World War.*—At once the forbidden words proved unexpectedly wide. On its face this statute seems directed against discussion which is plainly incitement of mutiny in the Army or Navy; but during the first World War the lower federal courts worked out a doctrine that if speech were unfavorable to the government, it might make soldiers discontented, and it did not have to be spoken to soldiers because, if you made their families discontented, the discontent would eventually spread to the soldiers. As a result, almost anybody who said anything against the war or against the conduct of the war might be in trouble.<sup>8</sup> Unlike the Sedition Act of 1798, the Espionage Act was not used against newspapers of general circulation, although Rose Pastor Stokes was convicted for a

<sup>7</sup> 50 United States Code, sec. 33.

<sup>8</sup> See FSUS, pp. 51-60.

## TREASON AND SEDITION IN WAR

mild letter printed in the *Kansas City Star*.<sup>9</sup> Some of the best-known cases involved speakers like Debs, but the unorthodox press did suffer considerable restraint. Prosecutions were directed against prominent Socialist newspapers like Berger's *Milwaukee Leader* and the *New York Call*, and against the *Masses* and other radical magazines. Many of these were also denied second-class postal rates.<sup>10</sup> Writers and distributors of pamphlets and handbills were frequently punished, notably the Abrams groups who brought about the great dissent of Justice Holmes urging "free trade in ideas."<sup>11</sup>

After the Armistice the Supreme Court put some check on this loose interpretation of the Act by imposing the "clear and present danger" test,<sup>12</sup> but the majority's application of this test (from which Holmes and Brandeis frequently dissented) still allowed it to cover a wide range of political and economic discussion.<sup>13</sup>

The intent to cause tangible harm, which is the second element of the statutory crime, was also construed so as to afford little protection for comments on the causes, aims, and methods of the war. In most of the district-court convictions and in many of the Supreme Court cases, the objective evidence of any plan to bring about a mutiny or interfere with enlistments and the draft was very weak, and the jury was left pretty much at liberty to conclude that a defendant who expressed such objectionable views must have the requisite wicked mind.

<sup>9</sup> FSUS, pp. 52-53. The conviction was reversed, but long after the Armistice.

<sup>10</sup> See above, pp. 296-97; FSUS, pp. 38-51, 97-99, 298-305.

<sup>11</sup> *Abrams v. United States*, 250 United States Reports 616 at 624 (1919); and see the account of the Pierce pamphlets, above, chap. 7.

<sup>12</sup> Above, pp. 49-60.

<sup>13</sup> See FSUS, pp. 86-97.

## TREASON AND SEDITION IN WAR

*The second World War.*—Contrary to expectations, the Espionage Act has been sparingly used during the present war.<sup>14</sup> At the outset the control of prosecutions was kept in the Attorney General's office, whereas for most of 1917 and 1918 every United States district attorney acted on his own initiative, subject to much local pressure. Not only have there been very few recent prosecutions,<sup>15</sup> but also the Act has been much more strictly construed by the Supreme Court. In June, 1944, while our troops were still struggling to gain Normandy, the majority of the Court gave greater protection to freedom of speech than their predecessors of 1919-20 thought safe long after the last gun was fired.

Hartzel, a free-lance writer on economic subjects, had published several articles before Pearl Harbor, attacking President Roosevelt, the English, and the Jews and advocating a German victory. In 1942 he wrote out and mimeographed three more articles full of similar denunciations, which depicted the war as a gross betrayal of America and called for the abandonment of our allies. They urged that, instead of

<sup>14</sup> See Lerner, in *Safeguarding Civil Liberty Today* (1945), pp. 40 ff., reviewed by Chafee in 58 *Harvard Law Review* 1093.

<sup>15</sup> Besides the Hartzel case, the following cases are reported, all ending in convictions except the last: *United States v. Pelley*, 132 *Federal Reporter*, 2d Series, 170 (C.C.A. 7th, 1942), review denied, 318 *United States Reports* 764, 801 (1943) (periodicals and pamphlets); *United States v. Gordon*, 138 *Federal Reporter*, 2d Series, 174 (C.C.A. 7th, 1943), review denied, 320 *United States Reports* 798, 816 (1944) (speeches); *Butler v. United States*, 138 *Federal Reporter*, 2d Series, 977 (C.C.A. 7th, 1943) (speeches); *Couchois v. United States*, 142 *Federal Reporter*, 2d Series 1 (C.C.A. 5th, 1944), review denied, 323 *United States Reports* 754 (1944); *Fiedler v. Shuttleworth*, 57 *Federal Supplement* 591 (Pa. 1944), 153 *Federal Reporter*, 2d Series, 999 (C.C.A. 6th, 1946) (anonymous postcards to soldier); *United States v. Bell*, 48 *Federal Supplement* 986 (Cal. 1943) (seizure of pamphlets), 3 *Federal Rules Decisions* 118 (1943) (charge of Judge Yankwich). The blanket sedition trial in Washington was not based on the Espionage Act, although the Act was included in earlier indictments. See above, p. 577.

On the suppression of *Social Justice* under the Act see above, pp. 318-20.

## TREASON AND SEDITION IN WAR

waging hostilities abroad, we should have an internal war of race against race and that our soil should be occupied by foreign troops until we were able to stand alone. He did not suggest mutiny or refusal to enter the armed forces. After carefully compiling a mailing-list of six hundred prominent people including the Commanding General of the Army Air Force, a colonel on the General Staff, and the officers of the United States Infantry Association, he sent out his three screeds, taking care not to leave any fingerprints on the envelopes. For this, Hartzel was convicted under the second and third clauses of the Espionage Act.

The Supreme Court set aside his conviction in a five-to-four decision.<sup>16</sup> Although many recent decisions, including the *Times-Mirror* contempt case, make it probable that, when involved in an Espionage Act case, the clear-and-present-danger test would be applied to leave more room for political discussion than did the cases of 1919-20, neither side bothered to decide whether Hartzel's lucubrations created such a danger of mutinies or draft evasions. All the Justices looked solely into the question whether the jury could properly find that he had the intent to bring about such conduct on the part of his readers. In holding for the majority that there was not sufficient evidence of intent to go to the jury, Justice Murphy said:

Thoughtlessness, carelessness and even recklessness are not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime. . . . [Unless such an intent is properly established] an American citizen has the right to discuss these matters either by temperate reasoning or by immediate and vicious invective without running afoul of the Espionage Act.<sup>17</sup>

<sup>16</sup> *Hartzel v. United States*, 322 United States Reports 680 (1944).

<sup>17</sup> This opinion was also adopted by Chief Justice Stone and Justices Black and Rutledge. Justice Roberts concurred briefly in the reversal.

## TREASON AND SEDITION IN WAR

The dissenting opinion of Justice Reed, in which Justices Frankfurter, Douglas, and Jackson concurred, pointed out that the Court was not a jury. Whatever they themselves thought about Hartzel's intent was immaterial. The dissenters considered that the jury had enough basis for convicting, although there was no direct appeal that soldiers should not do their duty. The Act included "less obvious and more skillful ways of bringing about the same mischievous results."

If Hartzel's case had come before the Court which sent Debs to prison, he would not have had a ghost of a show. The majority have at last made the Espionage Act mean what it says.

### WARTIME SEDITION UNDER STATE LAWS<sup>18</sup>

These were also often used in World War I, especially in Minnesota. Although the statutes are still in the books, I have not heard of a single prosecution during this war.

### FOREIGN-LANGUAGE NEWSPAPERS

These were subjected to very strict control in World War I under the Trading with the Enemy Act.<sup>19</sup> Whether or not the statute is in force, it has not been used in this war. The watchfulness of the Federal Bureau of Investigation has been a check upon any of these newspapers which happened to have disloyal editors.

<sup>18</sup> See FSUS, pp. 285-89, 575.

<sup>19</sup> 50 United States Code, Appendix, sec. 19.

## CENSORSHIP OF NEWSPAPERS AND BROADCASTS

**T**HE Office of Censorship was set up soon after this war began. Its influence was much wider than its legal powers, which were limited. On December 18, 1941, Congress provided that, whenever the President should determine that public safety demanded it, he might cause censorship over communications between the United States and any foreign country specified by him.<sup>1</sup> This power included incoming and outgoing messages carried on a vessel, train, airplane, etc., or sent by mail, cable, radio, or other means of transmission. The President was empowered to establish rules, and any violations were subject to the maximum penalty of ten years' imprisonment, a fine of \$10,000, and the forfeiture of the vessel or any other property concerned. Next day, the President established the Office of Censorship with control over the methods of transmission outlined in the statute between the United States and foreign countries.<sup>2</sup> The new agency was headed by the Director of Censorship.

The President appointed to this position Byron Price, a well-known newspaperman with extensive experience, ending in charge of the entire news reporting of the Associated Press.

<sup>1</sup> First War Powers Act (1941), 50 United States Code, Appendix, sec. 618.

<sup>2</sup> Executive Order No. 8985, 6 Federal Register 6625.

## WAR CENSORSHIP OF NEWSPAPERS AND RADIO

Having also served as an officer in World War I, he was able to see both sides of the censorship problem.

The Office of Censorship in World War II corresponded roughly to the Censorship Board established in 1917. This was also under a newspaperman, George Creel, but he was a free-lance journalist and so less familiar with the routine of news service than Mr. Price. Mr. Price was boss, while Mr. Creel was only one among several heads of the old Censorship Board. He could be outvoted on the 1917 board by his associates, who were representatives of the Secretaries of War and Navy, the Postmaster General, and the War Trade Board. These representatives were far from harmonious, and several of their policies have been subjected to sharp criticism.<sup>3</sup> Evidently President Roosevelt was aware of the shortcomings of the 1917 censorship and tried to avoid these by the somewhat different organization of the new Office of Censorship. This time the Director could really run the office.

The Executive Order of December 19, 1941, set up two boards, one to advise the Director on matters of policy and the co-ordination and integration of censorship and the other to carry on the actual operations of censorship under his orders. The Censorship Policy Board had the Postmaster General as chairman and included the Vice-President, the Secretaries of the Treasury, War, and Navy, the Attorney General, and the Directors of the Office of Government Reports and the Office of Facts and Figures. Perhaps it was felt that these high officials would be more sensitive to public reactions than the men of lower rank who formed the 1917 board. The Censorship Operating Board, which did the detailed work, consisted of representatives from such government departments and agencies as the Director specified. It

<sup>3</sup> See Mock, *Censorship—1917* (1941).

## WAR CENSORSHIP OF NEWSPAPERS AND RADIO

was to perform whatever duties with respect to operations the Director determined. Obviously, both boards existed just to help Mr. Price. He must have made the main decisions.

Besides utilizing the existing personnel of any department or agency whenever their employees happened to be available, the Director could engage such additional persons for his Office as he deemed requisite. This was an important change from the situation in 1917. Since Congress neglected to appropriate any money for the expenses of Mr. Creel's board, almost all the work had to be done by employees of the Post Office on postal pay. Consequently, the substantial control over the selection of employees and the performance of their work soon drifted into the hands of Postmaster General Burleson, although he was not even a member of Mr. Creel's board. The attempt to use invalided Army officers broke down, because they could not be persuaded to serve in the Post Office with its prevalent political control. So postal employees, who lacked education and were not trained for the highly specialized work of censorship, were engaged. Since insufficient care was often used in their selection, some of the examiners of mail were as open to suspicion as the correspondents against whom they were supposed to guard. They even read official mail and marked it "Opened by mistake." Dangers of this sort were minimized in the second World War by the clause allowing Mr. Price to choose his own staff if he wished, and no doubt money to pay them was available from funds at the President's disposal.

The Director's powers over foreign communications under the 1941 Order were very wide. He was authorized to take all such measures "as may be necessary or expedient" to administer his control over these communications. He issued a detailed set of regulations subjecting every sort of international



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transmission to censorship and specifying many subjects to which no reference should be made unless they were officially disclosed.<sup>4</sup> The bulk of the work of the Office of Censorship had nothing to do with the press, but concerned mail, telegrams, and wireless messages crossing our frontiers in either direction. However, the law required him to watch the performance of broadcasting stations (of which more later) and to spend considerable labor in examining newspapers and periodicals passing to and from other countries.

All exported newspapers and periodicals were read every issue. The large publications submitted dummies beforehand. The major publications were divided for reading purposes among the various export stations around the country. Each on approving cleared for all so that duplication was avoided.

On exported matter, opinions might be excluded if they entered definitely into the military picture. Thus Eisenhower requested that certain comment on the Darlan deal, which was flowing into his area, be curtailed, since it impinged on the French and complicated his military situation. Such comment was therefore banned for two weeks. The Office regarded such action as military censorship, though it did have political aspects. Some comment on the race question was also stopped. Discussions in Congress were transmitted, but some British correspondents were sending matter that would have hindered military operations abroad because of the race problem within the Army itself. When some accounts of labor troubles were beneficial to the enemy at the particular moment, they were held up for a day or two to make sure that they were accurate, not sensational or misleading. Charges that the Office tried to keep information from the British

<sup>4</sup> 32 Code of Federal Regulations, 1943 [Cumulative Supplement, chap. xvi.

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people are categorically denied. Curtailments of exported opinions became fewer and fewer as time went on, and practically ceased after the victories in Normandy. Even British correspondents who were thought to be giving a very unfair criticism of American politics were then left alone.

It must be remembered that outside the range of Mr. Price's Office, a much more extensive compulsory censorship was administered by the Army and Navy in the areas under their control, which included most of the land and water outside of the United States. Every civilian who went into a theater of military operations had to make an advance commitment not to publish anything which was not censored by the military authorities. So far as the law went, the military authorities could do anything they wanted in the way of suppression. I hope that a scholarly account will eventually be given of the practical operation of military censorship during this war, but I am not qualified to write about this important subject. Although foreign correspondents sometimes talk as though military censorship handicapped them in winning the war, there were probably many sound reasons for their dissatisfaction.<sup>5</sup> The difference in smoothness of operation in the various theaters of war was very striking. It is no secret that the unfortunate Kennedy episode on V-E Day was the result of mounting discontent with the handling of censorship by Eisenhower's appointee.

The control of the military authorities sometimes extended over the publication of material written in the United States. For example, the *Harper's* article on MacArthur was not under the jurisdiction of the Office of Censorship but was eliminated through Army censorship because the author, as an

<sup>5</sup> For adverse criticisms by an able correspondent see Eric Sevareid, "Censors in the Saddle," *Nation*, April 14, 1945.

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accredited war correspondent, had to submit it to the War Department Bureau of Press Relations, which withheld approval.

American newspapers and magazines were not placed by law under Mr. Price's supervision unless they were sent abroad. Except for possible exclusion from the mails by the postal officials, the press was technically free to print whatever it pleased without interference and take its chances of a later prosecution under the Espionage Act. Officially the Director of Censorship was only the watchdog at the door of the nation to see what went out or came in. Yet practically Mr. Price had a good deal to say about what happened inside.

On January 14, 1942, he issued a comprehensive Code for the press in wartime, which indicated "certain classes of information which might be of aid to the enemy."<sup>6</sup> This domestic Code of Wartime Practices was worked out in consultation with the Army and Navy (as to military matters), the American Newspaper Publishers Association, American Society of Newspaper Editors, National Editorial Association, etc. Although the military people did not get all they wanted, the Code was drawn up in the interest of the government, not the press, but the newspaper associations all approved it.

The Code begins with the encouraging statement that "it will not mean a news or editorial blackout." The Office of Censorship hopes that the American press "will remain the freest in the world, and will tell the story of our national successes and shortcomings accurately and in much detail." Then follows a summary of subjects as to which Mr. Price requests news to be withheld unless authorized by the appropriate government authority. The information listed relates to troops,

<sup>6</sup> *New York Times*, January 15, 1942, p. 12, col. 1. This voluntary code should be compared with the compulsory regulations of exported newspapers, above, n. 4.

## WAR CENSORSHIP OF NEWSPAPERS AND RADIO

ships, planes, fortifications, production and transportation of war supplies, weather, photographs, maps, and similar matters.

What happened to any newspaper or magazine which failed to comply with this Code? Nothing, so far as the Code itself went. It was purely advisory. No penalty was named. As the law stood, none could be imposed by the Office of Censorship with respect to domestic circulation of the prohibited information. The entire Code was a request. Every editor was his own censor and was requested to ask himself of every item of information whether it was something which the enemy would be glad to have.

Yet, in spite of its voluntary character, there was not a single instance of deliberate disregard of the Code. A few mistakes occurred, to be sure, but the Office was surprised there were not more. Mr. Price's requests were more faithfully obeyed than most statutes.

No doubt every editor knew that disagreeable consequences might follow his violation of the Code. Export of the newspaper could be stopped completely unless it cared to go to the great expense of printing a sterilized edition for foreign consumption. Charges that the Espionage Act was infringed might result in a criminal trial or the loss of mail privileges. Mr. Price might ask the Army and Navy to deny credentials to its war correspondents. Finally, the government had all sorts of ways of making a noncomplying newspaper uncomfortable. Its Washington correspondents would not be welcome at press conferences or when they sought official information, governmental releases might not be sent to its office, and the condemnation for its defiance of Mr. Price would be given wide publicity which might render the newspaper very unpopular with its competitors, advertisers, and readers. Hence an edi-

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tor would think a long while before he got in wrong with the government by flatly disregarding the Price Code. And there was always a gun behind the door—compulsory censorship if the voluntary system broke down, and perhaps Army and Navy officials deciding what newspapers could print.

It was not these indirect sanctions, in my opinion, which brought about the success of the Office of Censorship. The patriotism of the press was responsible, and Mr. Price's skill in organized persuasion. An added reason was the high quality of the personnel in charge of the voluntary newspaper and broadcasting codes. Every one of them was drafted by Mr. Price, just as he had been drafted by the President, and no position in either of these departments was ever given to any person looking for a job. The result was that press censorship and broadcasting censorship were administered by men nationally known in these industries and having the complete confidence of their colleagues.

The domestic press division covered the country with a paid staff of only fifteen persons (including clerks and stenographers), who were aided by local volunteers described later. It spent less than half of one per cent of the total Office budget. The staff worked very fast. Once it cleared a newspaper story paragraph by paragraph through the use of telegraph and telephone, in order to meet a deadline—as Mr. Price put it, “a speed unique in government regulation.”

The stroke of genius in the Code was the paragraph tucked in at the end: “In addition, if any newspaper, magazine, or other agency or individual handling news or special articles desires clarification or advice as to what disclosures might or might not aid the enemy, the Office of Censorship will cooperate gladly. Such inquiries should be addressed to the Office of Censorship, Washington.” This provision for ad-

## WAR CENSORSHIP OF NEWSPAPERS AND RADIO

vance rulings turned out to furnish the mechanism by which practically all the work of the domestic press division was accomplished.<sup>7</sup> Instead of having to go over everything printed in the United States, the Office saw only the doubtful material. Almost all of this did get sent in voluntarily, and in this way thousands of items were eliminated every hour. Newspapers were very active in submitting questionable items and very careful to comply with adverse rulings. Among the most scrupulous were journals with a strong anti-Administration editorial policy, like the *Chicago Tribune* and the *New York Daily News*.

The domestic press division found prodigious difficulty in maintaining contact with all the publications. Daily newspapers were easy to reach, since they received government bulletins automatically. (The foreign-language press required no special procedure.) The trouble came with the weeklies and monthlies, especially the numerous small publications by churches, lodges, colleges, etc. An excuse given by many editors of these was that they did not even read their Washington mail. The censored item which caused most trouble was publication of the unit identification of a soldier or the ship of a sailor. This sort of journal wanted to supply his address to friends, but such information was very valuable to the enemy when published.

Supervision over the small papers was exercised through a voluntary unpaid "missionary" in each state (or region of a large state). These men came to Washington at their own expense and were instructed for a week. They returned a year later with amazing and inspiring reports of their energetic work in visiting an enormous number of local papers and per-

<sup>7</sup> Compare the discussion of advance rulings in the Customs and the Post Office, above, pp. 340-43.

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suading them to comply with the Code. The procedure in a case where a journal was publishing matter violating the Code, after failing to submit it to the Office, was almost always this: A form letter was sent. If not answered in a week, it was followed by a second stiffer letter. If again no reply, a registered letter was sent. Then, if necessary, the regional missionary was telephoned and made personal contact with the offender. Once when all the preliminary steps were fruitless, the missionary found a small paper with its entire staff one woman—a rabid Republican. She finally agreed to conform to the Code by saying, "Tell those skunks in Washington I'll do what they want me to do, but I won't answer their cursed letters!"

Domestic censorship was carried out carefully on the criterion of definite military damage. Care was essential because the whole program was on a voluntary basis. The Office realized that if a mistake was made by suppressing material with political rather than military implications, the repercussions in the competitive newspaper situation would "blow the whole operation to hell," and it was better not to take the risk. Thus a story in one large paper that Marshall was to be made Invasion Chief because of British pressure to get him out of Washington was not censored, though perhaps it might have been. Freedom of the press was defined as freedom to express opinions, advocate, criticize, or complain (except for treason or violations of the Espionage Act) but not freedom to disclose information. The sole test was "Is this information that the enemy would like to have?" and not "Is this an opinion that would please him?" Domestically, no attempt was made on any occasion to interfere with any expression of opinion, no matter how violent, vicious, or outrageous—unless a jury would convict it as seditious. The Office thought it better to

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permit the doubtful comment than to take the chance of prohibiting legitimate criticism.

As to broadcasting, the censorship was also voluntary, but it overlapped the statutory censorship on transmission across the border, since it was impossible to prove that a given station could not be heard outside the United States. The sanction of taking the station over for the duration never had to be applied, though the threat was made once. A few provisions were inserted in the Radio Code which were not in the Press Code, for instance, against man-on-the-street programs, since these might give enemy agents access to a microphone. On the whole, information conveyed by radio was not very important, and the broadcast division was even smaller than the press division. A small group of monitors was set up to hear the chief commentators and newscasts. Also, competing stations listened to each other closely and made occasional complaints. Foreign-language broadcasts were monitored by the Federal Communications Commission.

My high estimate of compliance with the Office of Censorship is confirmed from sources directly concerned in its operations. At first the military had very little confidence in a predominantly voluntary system with hardly any direct sanctions. They expected it to collapse soon and that they would have to take over. Instead, top military authorities came to praise the job which press and radio had done. And the industry was also satisfied. After the collapse of Germany, the newspapers were circularized for suggestions of changes in the Code. The few which bothered to reply all favored leaving the Code as it was.

Many times in this book I have had to be critical of the mass communications agencies. Here was a case of remarkable voluntary co-operation of the press in promoting the general



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welfare. Another example occurred after Mr. Roosevelt's death, when newspapers and radio concentrated all their energies for two days to make an impressive national memorial so far as communications were concerned. No doubt, awareness of a great crisis played a part in these displays of co-operation and less is to be expected in normal times. Yet the history of the Office of Censorship shows that there are better means than punishment to produce high standards. As the old saying goes, "You can catch more flies with molasses than with vinegar." The experience of Mr. Price may point the way to the assumption by the press itself of responsibilities to meet the needs of the community, with the government not threatening but encouraging.

It is evident from the foregoing account that three quite different censorships of the press were operating in the present war: (1) compulsory censorship at the border, in between (2) voluntary restraints inside the country administered by the same civilian Office of Censorship and (3) rigid compulsory controls outside the country enforced by the Army and Navy.

Censorship ought to stop with the shooting. There is no danger of giving information to the enemy when the enemy is already licked. Consequently, the first two kinds of censorship, like the Office which took care of them, have virtually ceased to function. As to the third type, military censorship, much more doubt exists. I do not know how far the situation abroad before December 7, 1941, has been restored. After the Armistice in 1918, the British and French continued their censorship, and the effect of this on the Versailles Peace Conference was bad. It might have made a difference to the attitude of the Senate toward the Treaty. In spite of the cessation of hostilities in the present war, the prolonged occupation of

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enemy territory and the possible perpetuation of the draft in some form or other will naturally incline many Army and Navy officials to think that the retention of their powers of censorship is necessary to national safety. There is a tendency for military people to extend their great wartime powers of censorship (a) into areas of politics during war and (b) beyond the period of hostilities. Inasmuch as the war organization must now persist through a long occupational period, war censorship inevitably has great political consequences for several years to come. Without knowing the actual amount of American military censorship at the moment in European and Pacific areas, I think that it will be useful to make the assumption that it is considerable and then inquire about the effects of such a hypothetical situation upon the need of American citizens to know essential facts.

Mr. Price, as I have said, was very careful to distinguish between military facts and political facts. Regardless of his success, censorship by the Army and Navy is something quite different. Military censorship has always tended to exceed its bounds and go into political censorship. One of the numerous unfortunate consequences of modern methods of warfare is that the area of military concern is constantly widening. Almost every activity becomes a part of national defense. We may live to see the day when the line between military and political matters is so blurred that a newspaper will be forbidden to publish the name of the President of the United States or tell where he lives for fear of making him an easy target for a sneak atomic bomber. Even now the significance of occupation policies is largely political—our relations with Russia, and so on. Very able officers of the allied military government *could* tell citizens about a bad situation, but are prevented from speaking. Personal letters from them have been

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smuggled out, saying "This is the way this thing works. Isn't there something that can be done about it, because we are in the machine and we can't?"

Their question raises a very difficult problem, which extends far beyond war and its aftermath: How far should government employees, while in office, be allowed to publish criticism of the conduct and policies of their superiors? The advantages of thoroughgoing loyalty in a military or civilian subordinate are obvious; and the offhand reaction of most people is that if such a person is dissatisfied with the way affairs are going, he should resign before having his say. Still, not every officer can afford to throw up his job, and his resignation may be forbidden during hostilities or a technical state of war like the present. And there is much more to be said on this side.

To make the problem concrete, let us have an imaginary place under American occupation called Adano. It does not matter whether it is a city in Germany or somewhere in the Pacific. It is thickly populated with natives—Germans, Poly-nesians, or Japanese. Native affairs and American troops are badly demoralized because of the policies of the administrator in charge, General Marvin, in spite of the efforts of his subordinate, Major Joppolo, to promote sound political, economic, and social conditions. If any American newspaper correspondent who visits Adano and talks to Joppolo is required to submit his article to a military censor as during hostilities, the true state of affairs will probably not see the light of day. If Joppolo succeeds in leaving Adano and goes home to write an article in the *New Republic*, all the good he was doing in Adano comes to an abrupt end. By resigning to speak of bad conditions, he makes them still worse. It did not improve Sodom or Gomorrah when the few best inhabitants left.

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So the result of an enforced silence within the service may be that inefficiency or corruption on the part of men higher up will continue because honest persons who know the facts do not dare tell them to the public. And proposals by brilliant younger men for needed reforms may be delayed if they can be considered only by conservative insiders; the fate of Billy Mitchell's plan for our air force and De Gaulle's plan for mechanizing the French army illustrates the dangers. If there is in fact demoralization in occupied territory, the impossibility of telling about it diminishes the chances of any rapid change for the better.

Yet, on the other hand, complete freedom of subordinates to broadcast attacks on their superiors would open the door wide for cranks and greatly hamper any administration. Few men would be eager to undertake an important task if they were unable to place full trust in their subordinates and if they were going to be forced to drop pressing tasks in order to answer the published criticisms from the very men on whom they most relied.

Certainly, if subordinate officials must address all their adverse criticisms to their superiors, great care should be taken to enable those criticisms to be fruitful. This means that a criticism must be kept from being suppressed by the very superior who is criticized or by those who share his responsibility for the existing situation—Joppolo's report must not be channeled through General Marvin. Criticism must be sure to receive thoughtful attention from some other superior disconnected with the situation. So long as it is reasonable, refusal to act on it is not to lead to the dismissal of the critic or loss of promotion. Even so, something is wanting—the public stays untold.

It is a very difficult problem, which is bound to become

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increasingly frequent as the range of governmental activities increases. We have to realize that in the governmental hierarchy, both in the armed forces and in civilian offices in Washington, there are all sorts of inhibitions against free discussion.

A second possible peacetime repercussion from war censorship is more subtle. Some of the Nieman Fellows put it this way:

"Corporation officials have learned to hide disagreeable facts on the ground of military security. They may continue to use this as an excuse for withholding essential information from the public. They will wrap themselves in the flag. For example, such an attitude is not unlikely on the part of some officials in the airplane and radio business. The Army and Navy have trained public-information officers who may apply similar methods as civilians when they take public-relations jobs with business organizations or with the federal and state government. Many a county officer may feel that what he does is none of the public's business. All sorts of municipal departments, including the police, have taken on public-relations men who can if they wish prevent the press from getting access to proper information. Instead of the old time consultation of a reporter directly with the persons who know the facts, news is channelled. He is told to go to the official who specializes in telling only what he thinks good for the public to learn."

Although such a screener may prevent some misstatements by ill-informed newspapermen, it is much better to have the sifting of truth from falsehood done by the newspaper which serves the public than by the very agency which may deserve condemnation.

Thus wartime habits may have created new barriers between American citizens and the truth.



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